U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

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CASE NUMBER: 2001-LHC-964

OWCP NUMBER: 08-115665

IN THE MATTER OF

LOREN E. FREDIEU,
Claimant

v.

PREMIER INDUSTRIES,
Employer

and

EAGLE PACIFIC INSURANCE CO.,
Carrier

APPEARANCES:

Earl Pitre, Esq.
Kyle Wheelus, Esq.
On behalf of Claimant

Chris Lorenzen, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

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DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Loren Fredieu (Claimant) against Premier Industries (Employer) and Eagle Pacific Insurance Company (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 25, 2001, in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced twenty-three exhibits which were admitted, including: the deposition and reports of Dr. Kip Patterson; reports from Drs. Edward Gripon, Cherry Matthew, William Foster, Frank Lopez, Stewart Weil, and Fayez Shamieh; medical records from St. Patrick Hospital, and Hunter McQuire Medical Center; various letters and photographs; and Claimant's earning records with Employer.[1] Employer introduced seventy-nine exhibits which were admitted including: various medical records from St. Patrick Hospital, Dr. Frank Lopez, Drs. William Foster, Fayez Shamieh, Kip Patterson, Cherry Matthew, Ronald Goebel, Stewart Weil, Paul Ware, Francisco Perez, and Edward Gripon; wage records of Claimant, various court records; various correspondence; a return to work evaluation; a vocational rehabilitation assessment; a labor market survey; a claim payment history; social security records; tax records; payroll register; the deposition of Paul Ware; and Claimant's high school records.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The injury occurred on October 15, 1998;

2. The injury occurred in the course and scope of employment and an employer-employee relationship existed at the time of the accident;

3. Employer was advised of the injury on October 15, 1998;

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[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

4. Employer paid temporary total disability benefits from October 21, 1998 to October 18, 2001, for 156 weeks, at varying rates of compensation, totaling $82,271.50.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Average weekly wage at the time of injury;

2. Causation;

3. Reasonableness and necessity of psychiatric treatment;

4. Nature and extent of disability and date of maximum medical improvement;

5. Credit; and

6. Penalties, interest and attorney fees.

III. STATEMENT OF THE CASE

A. Chronology

Prior to his accident, Claimant had various construction and industrial jobs. (Tr. 39). Around 1997 Claimant attempted to start his own residential construction business that ultimately failed. (Tr. 85-86). Just before beginning work with Employer, Claimant worked as a fitter for Professional Industrial Maintenance. (Tr. 39-40, 84). The position required Claimant to do tack welding-holding two pieces of metal together-until a welder can finish the job. (Tr. 40). Claimant began working for Employer in March 1998 in Lake Charles, Louisiana. (Tr. 29). Claimant started as a fitter for Employer, but was shortly promoted to a working foreman overseeing a fifteen to twenty person crew that performed welding and retrofitting. (Tr.30).

The day of the accident, October 15, 1998, Claimant was talking to one of his workers in the bottom of a barge when a scaffold worker dropped a four foot scaffold rod approximately twenty feet into the "crane tub hole" striking Claimant on the head. (Tr. 49; CX 4, p.1; EX 13, p.1). Luckily, Claimant was wearing his hard hat. (EX 12, p.1). Immediately following the accident, Claimant was brought by safety personnel to Business Health Partners where Claimant articulated symptoms of numbness in his left hand, numbness in his left foot, and severe head pain. (EX 3, p.1-2). The staff at Business Health Partners stabilized Claimant's movements and called for an ambulance to transport Claimant to St. Patrick Hospital. *Id*.

At St. Patrick Hospital, diagnostic tests such as CT scans of Claimant's cervical spine, brain and dorsal/thoracic spine, and AP and lateral films of vertebral body height and disc spaces, all appeared normal. (EX 4, p.1; EX 5, p.1; EX 6, p.1; EX 7, p.1). The hospital physician gave Claimant some prescription medication and, instead of admitting Claimant to an overnight room, released him back to work with light duty restrictions. (Tr. 49; EX 10, p.1; EX 11, p.1). The next day, Claimant traveled back to Port Arthur, but was unable to work because of his injury. (Tr. 50).

On October 21, 1998, Claimant contacted Dr. Shamieh complaining of constant headaches, neck pain, left arm pain and numbness he suffered as a result of his workplace accident. (EX 12, p.1). A neurological and cranial exam established normal results, but Dr. Shamieh noted a diminished sensation to pin prick in the entire left upper extremity in comparison with the right. *Id*. Dr. Shamieh also diagnosed neuritis in the left upper extremity, cervical root irritation and post-traumatic headaches. *Id*. at 2. Dr. Shamieh authorized the use of anti-inflammatory medication and did not release Claimant to return to work. *Id*.

On November 11, 1998, Dr. Foster examined Claimant in relation to severe headaches, nausea, vomiting, near syncopal episodes, periods of staring into space and declining memory. (EX 13, p.1). Dr. Foster noted that Claimant was irritable and had somewhat impaired balance and coordination. *Id*. Claimant also reiterated to Dr. Foster that he had cervical pain, bilateral shoulder pain, numbness and tingling in the left foot, and photophobia associated with his headaches. *Id*. Dr. Foster diagnosed a severe concussion to the brain with neck and arm discomfort secondary to a radiculopathy. *Id*. at 2.

On November 19, 1998, Dr. Shamieh conducted a sensory nerve study and determined that Claimant demonstrated normal electromyography in left upper extremity muscles and normal motor and sensory nerve conduction. (EX 17, p.1). On November 23, 1998, Dr. Shamieh noted that Claimant continued to complain of neck pain and headaches. (EX 18, p.1). Taking one Ultram every six hours was not helping Claimant, so Dr. Shamieh added Amitriptyline at bedtime. *Id*.

A subsequent MRI of Claimant's Cervical Lumbar Spine, which was performed on November 19, 1998, revealed some arthropathic changes at C1/2, but no other significant abnormality. (EX 15, p.1). An MRI of Claimant's brain was performed on the same day revealing ethmoid sinus disease without any other abnormality. (EX 16, p.1).

By December 7, 1998, Claimant reported to Dr. Shamieh that he was feeling better, although he still suffered from headaches and dizziness, and Dr. Shamieh approved of cutting Claimant's Amitriptyline medication in half. (EX 19, p.1). On December 9, 1998, Dr. Foster noted continuing troubles with memory loss, but noted that Claimant's neck and arm pain had subsided. (EX 20, p.1). A new physical examination revealed that Claimant experienced pain with neck rotation and hyperextension. *Id*. Dr. Foster also found that Claimant had nystagmus, absent biceps, and a resisting tremor in his right hand. *Id*. Dr. Foster's diagnosis of a traumatic brain injury with severe cerebral concussion remained unchanged, and he referred Claimant to Dr. Patterson for a closed head injury work-up, complex EEG, and a brain map. *Id*.

On December 15, 1998, Dr. Shamieh conducted a brain study, which revealed that Claimant was within normal limits, and on the basis of this test, Dr. Shamieh ruled out a head injury. (EX 21, p.1). By February 18, 1999, Dr. Shamieh also noted that Claimant had a very poor memory and recommended that Claimant undergo biofeedback with Dr. Patterson. (EX 23, p.1).

On March 1, 1999, Claimant began a long series of treatments with Dr. Patterson. (EX 24, p.1). Additional symptoms that Claimant related to Dr. Patterson were: minor blurred distant vision, feelings of instability when he looks up, deep sleep with no dreams, difficulty controlling anger, episodes of rage, sadness, depression, weight gain, and anxiety. *Id*. at 2. Dr. Patterson diagnosed a cognitive disorder and recommended neuropsychological testing by Dr. Robertson, and neurofeedback to normalize Claimant's brain activity. *Id*. at 2-3.

Dr. Mathew examined Claimant on March 25, 1999, for a second opinion neurological evaluation. (EX 28, p.1). A physical exam produced normal results, and a review of Claimant's MRIs of his brain and cervical spine were unremarkable except for some arthropathtic changes at C1-C2. *Id*. at 2. Dr. Mathew concluded that Claimant had a history of cerebral concussion which would explain memory difficulty, headaches, irritability, and depression. *Id*. Given time and supportive care, Dr. Mathew opined that Claimant's headaches and symptoms should resolve in time, and hoped that Claimant could return to work within a few weeks. *Id*.

On May 19, 1999, Dr. Robertson, a clinical psychologist, performed a psychological assessment of Claimant. (EX 32, p.1). In a mental status exam Claimant was able to focus his attention, speak logically and coherently, effectively read and write, have immediate recall memory, have delayed auditory memory of seventy-five percent after thirty minutes, and have eighty-percent visual memory. *Id*. at 3. Dr. Robertson detected a severe deficit in the ability to sustain attention, reduced visual fields, a moderate impairment in a tactual performance test, mild reading problems, an IQ of 101, reading ability of a tenth grader, spelling ability of a fifth grader, mathematical ability of a seventh grader, mildly impaired delayed visual memory, and a moderate impairment in abstract reasoning and problem solving. *Id*. at 3-6. A personality examination revealed that Claimant viewed himself as damaged, and that Claimant had major thought disturbances to the point of disorientation, and an overall profile consistent with post-concussion disorganization. *Id*. at 7.

In total, Dr. Robertson estimated that Claimant suffered from a moderate degree of impairment affecting ninety percent of his neuropsychological functions, and damage to his frontal, right posterior frontal, anterior parietal, and left occipital regions, which may be due in part to a peripheral cervical injury. *Id*. Dr. Robertson recommended an aggressive treatment for Claimant's chronic pain, anxiety and depression. *Id*. at 8. Claimant's problems of attention, energy, anxiety and depression were all treatable components, but, Dr. Robertson opined that Claimant was not able to return to his prior occupation or any high risk occupation. *Id*. Specifically, Dr. Robertson stated that Claimant should not work around heights or dangerous machinery. *Id*. Further recommended treatment consisted of a referral to Dr. Foster for neurological injuries, pain management, anti-anxiety and depression medication, psychotherapy, and cognitive therapy. *Id*. Dr. Robertson also opined that Claimant's ultimate capacity to return to work could

not be determined until he had another year of treatment, and even then he would likely require vocational rehabilitation. *Id*.

Dr. Goebel examined Claimant on June 17-18, 1999, for the purpose of performing a second opinion neuropsychological evaluation. (Ex 33, p.1). Dr. Goebel performed the same test as Dr. Robertson and Claimant stated that he "did better this time." *Id*. Claimant related to Dr. Goebel that his vision and frequency of his headaches were improving, and stated his chief complaints as irritability and memory loss. *Id*. at 2. Claimant's neuropsychological results, however, were greatly different than those of with Dr. Robertson in that Claimant did much better on some test and much worse on others. *Id*. While noting that Claimant did not show evidence of malingering, several tests designed to reveal that effect generated borderline results. *Id*. at 2-3. These tests, along with the variability in results from Dr. Robertson's administration, suggested that Claimant had a considerable psychological overlay to his problems. *Id*. at 3. Also, Dr. Goebel opined that Claimant's test results revealed some exaggeration of symptoms possibly as part of a "cry for help." *Id*. Dr. Goebel recommended an immediate program of cognitive rehabilitation, lasting three to six months, followed by a repeat neuropsychological examination. *Id*.

Dr. Foster examined Claimant again on July 20, 1999. (EX 34, p.1). After reviewing Dr. Robertson's, and Dr. Patterson's reports, Dr. Foster conducted a neurological exam which revealed that Claimant's resisting tremor and coordination had improved considerably. *Id*. Diagnosing severe concussion, post-concussion syndrome and post-traumatic headaches, Dr. Foster opined that Claimant had not completely recovered. *Id*.

By September 28, 1999, Dr. Patterson noted that Claimant was making minor progress after attending eleven neurofeedback appointments, and Dr. Patterson recommended another three to six months of weekly treatments. (EX 24, p.5). Returning to work at light duty restrictions, however, was not an option because Dr. Patterson opined that one of Claimant's problems was a failure to live up to his own standards, and being in a work environment that was not fully supportive, would only damage Claimant further. *Id*. at 5. Dr. Patterson also stated that a systematic approach was required to deal with Claimant's headaches because they were interfering with his treatment leading Dr. Patterson to also diagnose pain disorder. *Id*. at 6-7.

Dr. Goebel conducted a repeat neurological assessment on December 6, 1999. (EX 37, p.1). Dr. Goebel noted that Claimant had shown significant improvement in his performance IQ, and other improvements suggested that Claimant was now functioning in the mild range of organic brain impairment. *Id*. at 2. Claimant also exhibited improvement in concentration, cognitive ability, logical reasoning, and memory. *Id*. Claimant's emotional condition, however, did not show any changes, which contributed to Claimant's overall poor neuropsychological functioning. *Id*. at 2-3. Dr. Goebel further opined that there was not any evidence of malingering, as Claimant was both motivated and hard-working. *Id*. at 3. Claimant also reported that many of his symptoms had cleared, but he continued to suffer from severe two-to-four hour debilitating headaches which occurred about once every other day. *Id*. Dr. Goebel recommended that Claimant attend pain management, and agreed with Dr. Patterson that Claimant's

headaches were the largest obstacle to returning Claimant to work. *Id*. Dr. Goebel recommended another three months of neurofeedback and cited a need for neuropsychological rehabilitation. *Id*.

On January 13, 2000, Dr. Mathew conducted another second opinion neurological evaluation, finding Claimant essentially normal. (EX 39, p.1-2). Dr. Mathew found Claimant's description of his headaches somewhat "unusual and dramatic," and opined that there was a possibility that Claimant's headaches and memory loss may not be due to post-concussion syndrome but to vascular problems. *Id*. at 2. In regards to memory loss, Dr. Mathew stated that such problems usually clear up after a year and opined that Claimant suffered from "tremendous psychological overlay to his symptoms." *Id*. Dr. Mathew recommended that Claimant take prescription drugs for his headaches, anti-depressants, anti-anxiety medication, and undergo pain management. *Id*. Furthermore, Dr. Mathew opined that Claimant should not return to regular work in a shipyard, cited the need for vocational rehabilitation in a field where Claimant could reduce his mental strain, and stated the Claimant had not reached maximum medical improvement.

On February 1, 2000, Claimant began pain management treatment with Dr. Lopez. (EX 41, p.66). Claimant described his head pain as burning, sharp and shooting, rating the severity of his pain between three and ten. *Id*. at 72. Claimant also related that the color red causes a headache and that total darkness without any sound made his pain subside. *Id*. at 74. Dr. Lopez opined that Claimant suffered from migraines and the agitation on seeing the color red may be a result of seizure type activity. *Id*. at 90. On March 1, 2000, Claimant indicated to Dr. Lopez that a prescription of Topomax and Tegretol reduced the frequency and intensity of his headaches, but he continued to have problems with poor memory, poor comprehension and fatigue. (EX 41, p. 96). On Claimant's next appointment, April 5, 2000, he indicated that the prescription medication continued to decrease the frequency and intensity of his headaches. (EX 41, p. 103). On July 18, 2000, Claimant indicated to Dr. Lopez that he ran out of prescription medication in June and his debilitating headaches returned in full force, however, he reported their duration was reduced to about once per week. (EX 41, p.107). Dr. Lopez only change in treatment was to change Claimant's prescription. *Id*.

On April 19, 2000, Dr. Patterson reported results of his neuropsychological rehabilitation treatment stating that Claimant had an odd mixture of lost skills, preserved skills, and partially dysfunctional skills. (EX 24, p. 9). Foremost, Claimant had a decreased ability to process information due to a loss of brain cell integrity. *Id*. Claimant's short term memory was "deficient and his 'working memory' was inadequate for the tasks that he was accustomed to processing." *Id*. Specifically, Dr. Patterson noted that Claimant had forgotten how numbers relate to one another, could not remember goals he set for himself, he had poor visual memory trace, lost of ability to speak Spanish; lost his sense of rhythm, he had trouble assembling complex objects, experienced difficulty in determining distances and distinguishing colors, and had lost some motor ability. *Id*. at 9-11. This loss of ability caused Claimant distress because he stated that he was once skilled in applied math and he enjoyed his job as a construction project manager which he was no longer able to perform. *Id*. at 11. Because Claimant was trying hard and experienced progress, Dr. Patterson received authority to conduct twelve more treatment sessions. *Id*. at 12.

On July 27, 2000, Dr. Patterson noted that Claimant's memory skills had reached a plateau, little improvement was made in attention and concentration, he continued to have difficulties in other areas, and the color red seemed to provoke headaches in Claimant. (EX 24, p.13). Also, Dr. Patterson noted that while Claimant's headache medication Tegretol created decreased reaction time, without it, Claimant suffered severe headaches and was basically non-functional. *Id*. at 14. Although declining to say that Claimant had reached maximum medical improvement, Dr. Patterson stated that Claimant's rate of improvement in several areas had slowed to a point that the injury-induced deficits were permanent in nature. *Id*. at 15. Specifically, Claimants memory, mathematical and attention deficits; rate of information processing; inability to do parallel and multi-tasking processing; and headache pain showed little, if any, signs of improvement. *Id*. Also, Claimant's emotional difficulties would likely increase as he faced the extent of his loss. *Id*. Accordingly, Dr. Patterson noted that Claimant's prognosis in regards to his cognitive, depressive, and pain disorders was guarded, and he recommended that Claimant undergo a thorough neurological, neuropsychological, and psychiatric evaluations with continued neurofeedback for remediation. *Id*. at 15-16

On September 19, 2000, Dr. Lopez noted that Claimant's condition was stable and noted continuing problems of headaches, neck pain and difficulty with mobility. (EX 41, p. 111). An x-ray of the neck taken on September 19, 2000, however, revealed a normal film. *Id*. at 112.

By September 27, 2000, Dr. Patterson, now treating Claimant as a psychotherapist so that Claimant can come to accept his losses, stated in a letter to Carrier that Claimant had not reached maximum medical improvement in relation to his Cognitive, Depressive and Pain disorders. (EX 24, p.17). Carrier approved twelve more sessions, and on November 9, 2000, Dr. Patterson wrote Carrier that Claimant had demonstrated improvement, but still had not reached maximum medical improvement. *Id*. at 19. Dr. Patterson noted that Claimant was developing a wandering left eye that impaired his vision, and there were continuing indications of neurological impairments. *Id*. Dr. Patterson blamed Claimant's failure to reach maximum medical improvement on the fact that Carrier had not approved a multi-modality treatment approach, and requested another twelve treatment sessions. *Id*. at 19-20.

Dr. Weil issued an independent medical evaluation of Claimant on November 20, 2000. (EX 42, p.1). Claimant reported he suffered severe headaches lasting three to four hours once in a period of several days. *Id*. at 3. Claimant also reported dizziness, disorientation, and a slow thought process. *Id*. After a physical and neurological exam, Dr. Weil concluded that Claimant suffered from post-concussion syndrome that had not created any specific neurological deficit. *Id*. at 4. Dr. Weil further opined that Claimant exhibited a significant psychological overlay and indicated that further psychiatric management was necessary with the prescription of anti-depressants. *Id*. From a neurological standpoint, however, Dr. Weil opined that Claimant had reached maximum medical improvement. *Id*. Dr. Weil concluded that with continued attempts to control Claimant's headaches with medication, and with psychological treatment, Claimant would be a good candidate for vocational rehabilitation. *Id*.

On January 9, 2001, Dr. Patterson noted that Claimant's mental condition had deteriorated to a point where Claimant was depressed and suicidal. (EX 24, p. 23). Although Dr. Patterson did not deem

involuntary commitment appropriate, he indicated that Claimant's condition was a direct result of Carrier's refusal to authorize proper psychiatric care and anti-depressant medication. *Id*.

On January 10, 2001, Dr. Perez, less than two days after Dr. Patterson examination, issued a neuropsychological and psychological evaluation on the request of Employer's attorney and never mentioned Claimant's severe depression as noted by Dr. Patterson. (EX 47, p.1). Claimant's main complaints were headaches, dizziness and loss of memory, but Claimant stated that he stayed busy and had "pretty much learned to live with [the symptoms] after two years." *Id*. at 2. Dr. Perez tested Claimant's IQ at 101, and found no impairment in his memory function. *Id*. at 5. Likewise, Claimant's language functioning was normal as was his perceptual motor functioning. *Id*. at 6. An academic functioning test revealed Claimants ability in spelling and arithmetic was at the sixth to seventh grade level and Claimant could read on a high school level. *Id*. A personality functioning test revealed that Claimant had a chronic problem of maladjustment and reflected evidence of symptom magnification and somatization. *Id*. Dr. Perez concluded that Clamant had some secondary gain issues, but from a neurological standpoint, Claimant was neither impaired nor disabled, and was fully capable of returning to employment. *Id*. at 7.

By March 13, 2001, Claimant indicated to Dr. Lopez that he continued to suffer headaches, but he felt more in control as his headaches were not nearly as frequent or intense. (EX 41, p. 119). Dr. Lopez noted, however, that Claimant's speech was slow and Claimant exhibited a decreased processing time. *Id*.

Dr. Ware conducted a psychiatric evaluation of Claimant on March 28, 2001, at the request of Employer's attorney. (EX 43, p.1). Dr. Ware diagnosed post concussion disorder, possible dysthymia, cerebral concussion with post-concussion syndrome, post-traumatic headaches, with moderate psychological stressors. *Id*. at 2-3.

On March 31, 2001, Dr. Perez reviewed the report of Dr. Patterson to issue an opinion on the reasonableness and necessity of psychological treatment. (EX 48, p.1). Dr. Perez stated that unlike Dr. Patterson, he found no neurological impairment, and stated that Dr. Patterson's psychological assessment failed to address Claimant's degree of depression. *Id*. Dr. Perez further stated that the psychological testing Dr. Patterson identified clearly demonstrated a psychological presentation of somatic concerns and secondary gain. *Id*. In Dr. Perez's opinion, based on his own neuropsychological and psychological testing, there was no effective treatment for Claimant's behavioral presentation since the reduction of symptom reporting is dependent on the outcome of litigation. *Id*. at 2.

After reviewing various medical records of Claimant, Dr. Ware, on April 27, 2001, concluded that Claimant was disabled as a result of his work related injury, but opined that Claimant's subjective symptoms were much greater than all his objective tests and findings, which were all normal. (EX 44, p.1). Claimant's main difficulties arose from depression. *Id*. at 2. Accordingly, Dr. Ware stated that he seriously doubted if Claimant had any physical or organic neurological brain impairment, and related that "his present symptoms are largely, if not completely, on a psychiatric level." *Id*. at 3.

Dr. Gripon performed an psychiatric evaluation of Claimant on June 8, 2001. (EX 53, p.1). A mental status evaluation revealed that Claimant had some difficulty in recalling past events, and his mood exhibited signs mild depression. *Id*. at 2. Claimant stated that he had difficulty with retention and became lost even attempting to drive around his home area. *Id*. Claimant related to Dr. Gripon that he was sluggish, dizzy, clumsy, and stated that his biofeedback with Dr. Patterson "might have helped." *Id*. at 2-3. Dr. Gripon diagnosed a cognitive disorder, dysthymia S/P head injury, and a current inability to return to work. *Id*. at 2. In regards to treatment, Dr. Gripon recommended psychoactive medication and outpatient psychotherapy for nine to eighteen months, at a frequency of once every other week. *Id*. at 3.

On July 16, 2001, Dr. Ware reviewed Dr. Gripon's report and disagreed with his conclusion that Claimant suffered from a cognitive disorder because Claimant did not show any impairment of memory in regard to the mental status examination, which Dr. Ware considered necessary to establish such a diagnosis. (EX 45, p.1). Dr. Ware also disagreed with Dr. Gripon time frame for reaching maximum medical improvement, opining that in his experience, a period of three months, with one psychiatric visit per month to regulate medications and six counseling sessions, was adequate for reaching maximum medical improvement. *Id*. Any longer treatment would only encourage Claimant to remain symptomatic and interfere with Claimant re-entering the workforce. *Id*.

On September 24, 2001, Dr. Gripon reported that Claimant appeared "totally spacey" and tended to stare and take a long period of time when asked simple questions. (CX 8, p.1). Claimant stated that he was having cognitive difficulties, trouble retaining information, and Dr. Gripon placed Claimant on Prozac to enhance cognitive ability. *Id*. Also, Dr. Gripon stated that he wanted to place Claimant in some supportive and directive short term psychotherapeutic work to see if that would help Claimant return to gainful employment. *Id*. On October 16, 2001, Dr. Gripon wrote a follow-up letter to Carrier reiterating his diagnoses of Cognitive Disorder, Dysthymia and "S/P Head Injury." (CX 23, p.1). At that date, Dr. Gripon stated that it was "far too early to have any reasonable or probable idea as to his potential degree of response/recovery." *Id*. at 2. He expected Claimant to respond to treatment within the next six to nine months. *Id*.

On October 18, 2001, Employer terminated Claimants temporary total disability benefits. (ALJX 1). Immediately following the formal hearing, Employer terminated all benefits effective October 12, 2001, mailed a Notice of Controversion on October 26, 2001, and issued a Notice of Final Payment (LS-208) on October 30, 2001. (Cl. Br. at 1-2).

B. Claimant's Testimony

Claimant testified that his job as a supervisor for Employer required him to plan ahead, organize work in stages, know when particular work was to be done, give safety training, make sure he had enough people, and make sure everyone did their job. (Tr. 40-42). Part of Claimant's job involved climbing, crawling and walking in areas where balance was required. (Tr. 42-43). As a supervisor, however, Claimant did not preform any welding. (Tr. 41). The earliest memory Claimant had after his workplace

accident was being strapped in an ambulance to go to St. Patrick Hospital, and he did not remember being taken out of the barge or the drive from Port Arthur to Lake Charles. (Tr. 49).

Since his accident Claimant testified that he had a hard time balancing without looking where he was walking. (Tr. 43). If standing with his eyes closed, or if he attempted to climb he would generally lose his balance. *Id*. Overall, Claimant testified that his coordination is very slow compared to his physical state before the accident. *Id*. Visually, flashing lights tend to disorient Claimant and cause nausea. (Tr. 48). Claimant tried doing some jobs around the house and tried welding once but was not able to effectively preform any task. (Tr. 45). While attempting a weld, he became disoriented by the flashing light and burned himself with the torch. (Tr. 45-47). Prior to his accident, Claimant testified that he never experienced any debilitating headaches, but stated that, at the time of the hearing, his headaches had decreased in frequency to one or two times per week and had a tendency to make him sick. (Tr. 44). In particular, red lights caused head pain. (Tr. 48). Claimant can drive, but generally tried to limit his driving to thirty or forty minutes, and when he suffered from headaches he pulled to the side of the road to sleep them off. (Tr. 55).

Claimant testified that as a result of his workplace accident he suffered several cognitive impairments. Prior to his accident Claimant was able to do math problems; now, however, his skills were poor and after considerable study he had reached a sixth grade level of functioning. (Tr. 54). Although he could read plans and diagrams, he had to go over documents three or four times before he could remember what he read. *Id*. Also, Claimant stated that he had lost his ability to perform complex mechanical tasks, keep rhythm, speak Spanish, and was much slower in performing tasks than before his accident. (Tr. 58-60).

Concerning his ability to drive, Clamant testified that he has a hard time remembering where he is going, becomes lost, and keeps a map and a compass for orientation. (Tr. 55). On the day of the hearing, Claimant drove to his attorney's office, an eighty mile trip, that took him three hours. (Tr. 55-57). Claimant could drive in heavy traffic, but such activities tended to disorient him. (Tr. 57). Since his accident Claimant traveled Claimant traveled close to 10,000 miles, largely by himself, for his various doctor appointments. (Tr. 100). Claimant testified that he was a danger to other drivers on the road. (Tr. 70).

On a typical day, Claimant testified that he cleaned, did housework, and tried his exercise therapy which consisted of mental games to help him with his memory. (Tr. 57). Claimant did not do any yard work and his mother cooked most of the meals. (Tr. 57-58). Claimant also walked around during the day for a couple of minutes and then watched television or read books. (Tr. 98-99). Claimant did not have any hobbies and the fact that he sits at home, bored, furthered his depression. (Tr. 99). Claimant did manage his bank account himself, but he testified that he did so at home where it was quiet and he had a lot of time to think about what he was doing. (Tr. 101).

Regarding his depression, Claimant testified that he had reason to be depressed prior to his workplace accident. In 1997, Claimant attempted to start his own residential construction business that

ultimately failed. (Tr. 85-86). Social Security records indicated that between 1995 and 1997 Claimant only earned $4,900.00, but Claimant testified that he overcame any anxiety and depression stemming from his business failure. (Tr. 86). Also, Claimant divorced his wife in 1996, and had a child with another woman whom he had not seen in the past four years. *Id*. When asked if that caused him to be depressed, Claimant stated, "I'm not real happy about that." (Tr. 86-87). Not knowing where his daughter is worries him, but in 1998 he made a conscious decision not to make any more support payments. (Tr. 87-88). In total, Claimant stated his life was "pretty miserable" because he could not go long without a debilitating headache or medication, he wanted to be "normal" again, and have his old job and life back. (Tr. 60). Claimant testified that his depression was such that he contemplated suicide. (Tr. 44, 61).

C. Exhibits

C(1) Medical Records of Business Health Partners

Immediately following the accident, Claimant was brought by safety personnel to Business Health Partners. (EX 3, p.1). Claimant personally related to the receiving staff symptoms of head pain and numbness in his left hand and left foot. *Id*. at 2. The staff at Business Health Partners stabilized Claimant's movements and called for an ambulance to transport Claimant to St. Patrick Hospital. *Id*.

C(2) Medical Records from St. Patrick Hospital

Claimant was admitted to St. Patrick Hospital on October 15, 1998, treated for a closed head and nerve injury, and released to go home on the same day. (EX 1, p.1; EX 2, p.1). A CT scan of Claimant Cervical Spine was normal and it showed no evidence of any fractures. (EX 4, p.1). Likewise, AP and lateral films revealed that vertebral body height and disc spaces were normal along with surrounding soft tissues. (EX 5, p.1). A CT scan of the brain and head revealed that the ventricular system was normal and there was no evidence of hemorrhage, fractures, or mass effect. (CX 6, p.1). A CT scan of the Dorsal/Thoracic Spine also appeared within normal limits. (EX 7, p.1). The hospital physician authorized prescription medication, instructed Claimant to call Dr. Shamieh if his symptoms deteriorated, and released Claimant back for work with light duty restrictions. (EX 10, p.1; EX 11, p.1).

C(3) Medical Records of Dr. Shamieh

Claimant first came under the care of Dr. Shamieh on October 21, 1998, complaining of constant headaches, neck pain, left arm pain, and numbness since his workplace accident. (EX 12, p.1). A neurological and cranial exam established normal results, but Dr. Shamieh noted a diminished sensation to pin prick in the entire left upper extremity in comparison with the right. *Id*. Dr. Shamieh diagnosed neuritis in the left upper extremity, cervical root irritation and post-traumatic headaches. *Id*. at 2. He released Claimant with anti-inflammatory medication, but did not release Claimant to return to any work. *Id*.

On November 19, 1998, Dr. Shamieh conducted a sensory nerve study and determined that Claimant demonstrated normal electromyography in left upper extremity muscles and normal motor and sensory nerve conduction. (EX 17, p.1). On November 23, 1998, Dr. Shamieh noted that Claimant continued to complain of neck pain and headaches. (EX 18, p.1). Taking one Ultram every six hours was not helping Claimant, so Dr. Shamieh added Amitriptyline at bedtime. *Id*. By December 7, 1998, Claimant reported that he was feeling better, although he still suffered from headaches and dizziness, and Dr. Shamieh approved of cutting Claimant's Amitriptyline medication in half. (EX 19, p.1).

On December 15, 1998, Dr. Shamieh conducted a brain study, which revealed that Claimant was within normal limits, and on the basis of this test Dr. Shamieh ruled out a head injury. (EX 21, p.1). By February 18, 1999, Dr. Shamieh also noted that Claimant had a very poor memory and recommended that Claimant undergo biofeedback with Dr. Patterson. (EX 23, p.1). On March 18, 1999, Claimant reported to Dr. Shamieh that his condition remained unchanged, and Dr. Shamieh recommended that Claimant continue his Amitriptyline medication. (EX 27, p.1).

C(4) Medical Records of Dr. Foster

On November 11, 1998, Dr. Foster, a neurosurgeon, examined Claimant in relation to severe headaches, nausea, vomiting, near syncopal episodes, periods of staring into space and declining memory. (EX 14, p.1). Dr. Foster noted improved balance and coordination, irritability, and visual hallucinations. *Id*. Claimant also reiterated to Dr. Foster that he had cervical pain, bilateral shoulder pain, numbness and tingling in the left foot and photophobia associated with his headaches. *Id*. Dr. Foster diagnosed a severe concussion to the brain with neck and arm discomfort secondary to a radiculopathy. *Id*. at 2. Dr. Foster ordered an MRI of Claimant's Cervical Lumbar Spine, which was performed on November 19, 1998, revealing some arthropathic changes at C1/2, but no other significant abnormality. (EX 15, p.1). An MRI of Claimant's brain was performed on the same day revealing ethmoid sinus disease without any other abnormality. (EX 16, p.1)

On December 9, 1998, Dr. Foster noted continuing troubles with memory loss, but noted that Claimant's neck and arm pain had subsided. (EX 20, p.1). A new physical examination revealed that Claimant experienced pain with neck rotation and hyperextension. *Id*. Dr. Foster also found that Claimant had nystagmus, absent biceps, and a resisting tremor in his right hand. *Id*. Dr. Foster's diagnosis of a traumatic brain injury with severe cerebral concussion remained unchanged, and he referred Claimant to Dr. Patterson for a closed head injury work-up, complex EEG, and a brain map. *Id*.

Dr. Foster examined Claimant again on July 20, 1999. (EX 34, p.1). After reviewing Dr. Robertson's, and Dr. Patterson's reports, Dr. Foster conducted a neurological exam which revealed that Claimant's resisting tremor and coordination had improved considerably. *Id*. Diagnosing sever concussion, post-concussion syndrome, and post-traumatic headaches, Dr. Foster opined that Claimant had not completely recovered. *Id*. In December 1999, Dr. Foster noted that Claimant still had considerable problems associated with headaches, nausea, and memory loss, but because he had not seen Claimant since December 9, 1998, he stated that he could not make a determination in regards to a date for

maximum medical improvement. (EX 38, p.2).

C(5) Medical Records of Dr. Patterson

On March 1, 1999, Claimant underwent treatment with Dr. Patterson, a clinical psychologist. (EX 24, p.1). Additional symptoms that Claimant related to Dr. Patterson were: minor blurred distant vision, feelings of instability when looking up, deep sleep with no dreams, difficulty controlling anger, episodes of rage, sadness, depression, weight gain, and anxiety. *Id*. at 2. Dr. Patterson diagnosed a cognitive disorder and recommended neuropsychological testing by Dr. Robertson, and neurofeedback to normalize Claimant's brain activity. *Id*. at 2-3.

By September 28, 1999, Dr. Patterson noted that Claimant was making minor progress after attending eleven appointments, and Dr. Patterson recommended another three to six months of weekly treatments. *Id*. at 5. Further, Dr. Patterson commented that Claimant was highly motivated in his recovery treatment, a well informed patient, and was not difficult to deal with as is the case with normal closed head injury patients. *Id*. at 6. Returning to work at light duty restrictions, however, was not an option because Dr. Patterson opined that one of Claimant's problems was a failure to live up to his own standards, and being in a work environment that was not fully supportive that did not understand his mental condition would only damage Claimant further. *Id*. at 5. Dr. Patterson also stated that a systematic approach was required to deal with Claimant's headaches because they were interfering with his treatment. *Id*. at 6. By October 21, 1999, Dr. Patterson noted that Claimant's headaches were creating significant interference with his biofeedback, and diagnosed pain disorder. *Id*. at 7.

On January 18, 2000, Dr. Patterson gained approval for a three month neuropsychological rehabilitation program. *Id*. at 8. On April 19, 2000, after Claimant completed ten of the twelve sessions, Dr. Patterson noted an odd mixture of lost skills, preserved skills, and partially dysfunctional skills. *Id*. at 9. Foremost, Claimant had a decreased ability to process information due to a loss of brain cell integrity. *Id*. Also, Claimant's short term memory was "deficient and his 'working memory' [was] inadequate for the tasks he [was] accustomed to processing." *Id*. Specifically, Dr. Patterson noted that Claimant had: forgotten how numbers relate to one another; a poor visual memory trace; difficulty remembering goals, assembling complex objects, determining distance, and distinguishing colors; lost his ability to speak in Spanish; lost his sense of rhythm; and had lost some motor ability. *Id*. at 9-11. These deficits caused Claimant distress because he stated that he was once skilled in applied math and he enjoyed his former job as a construction project manager which he realized that he would no longer be able to perform. *Id*. at 11.

On July 27, 2000, Dr. Patterson noted: Claimant's memory skills had reached a plateau; little improvement was made in attention and concentration; and the color red provoked headaches in Claimant. *Id*. at 13. Also, Dr. Patterson noted that while Claimant's headache medication Tegretol created decreased reaction time, without it, Claimant suffered severe headaches and was basically non-functional. *Id*. at 14. Although declining to say that Claimant had reached maximum medical improvement, Dr. Patterson stated that Claimant's rate of improvement in several areas had slowed to a point that the injury-induced deficits were permanent in nature. *Id*. at 15. Specifically, Claimants memory deficits, rate of

information processing, inability to do parallel and multi-task processing, mathematical deficits, attention deficits, and headache pain showed little, if any, signs of improvement. *Id*. Also, Claimant's emotional difficulties would likely increase as he faced the extent of his loss. *Id*. Accordingly, Dr. Patterson noted that Claimant's prognosis in regards to his cognitive, depressive, and pain disorders was guarded, and he recommended that Claimant undergo a thorough neurological, neuropsychological, and psychiatric evaluations with continued neurofeedback for remediation. *Id*. at 15-16

By September 27, 2000, Dr. Patterson, now treating Claimant as a psychotherapist so that Claimant can come to accept his losses, stated in a letter to Carrier that Claimant had not reached maximum medical improvement in relation to his Cognitive, Depressive and Pain disorders. *Id*. at 17. Carrier approved twelve more sessions, and on November 9, 2000, Dr. Patterson reiterated that Claimant was making progress, but still had not reached maximum medical improvement. *Id*. at 19. Specifically, Dr. Patterson noted that Claimant was developing a wandering left eye that impaired his vision, and continued to exhibit indications of neurological impairments. *Id*. Dr. Patterson blamed Claimant's failure to reach maximum medical improvement on the fact that Carrier had not approved a multi-modality treatment approach, and requested another twelve treatment sessions. *Id*. at 19-20.

On January 9, 2001, Dr. Patterson noted that Claimant's mental condition had deteriorated to a point where Claimant was depressed and suicidal. *Id*. at 23. Although Dr. Patterson did not deem involuntary commitment appropriate, he indicated that Claimant's condition was a direct result of Carrier's refusal to authorize proper psychiatric care and anti-depressant medication. *Id*. Carrier, however, refused to authorize further treatment, and wrote Dr. Patterson to determine just what his recommended treatment was. *Id*. at 24. Dr. Patterson replied on February 19, 2001, that his recommendation was a diagnostic evaluation and a trial of anti-depressant medication, and that he would refer Claimant to Dr. Gripon in Beaumont, Texas for this care. *Id*.

C(6) Medical Records of Dr. Mathew

Dr. Mathew, a neurologist and psychiatrist, examined Claimant on March 25, 1999, for a second opinion neurological evaluation. (EX 28, p.1). A physical exam produced normal results, and a review of Claimant's MRIs of his brain and cervical spine were unremarkable except for some arthropathtic changes at C1-C2. *Id*. at 2. Dr. Mathew concluded that Claimant had a history of cerebral concussion which would explain memory difficulty, headaches, irritability, and depression. *Id*. Given time and supportive care, Dr. Mathew opined that Claimant's headaches and symptoms should resolve, and hoped that Claimant could return to work within a few weeks. *Id*.

On January 13, 2000, Dr. Mathew conducted another second neurological evaluation, finding Claimant essentially normal. (EX 39, p.1-2). Dr. Mathew found that there was a possibility that Claimant's headaches and memory loss may not be due to post-concussion syndrome. *Id*. at 2. Dr. Mathew found Claimant's description of his headaches was somewhat "unusual and dramatic," and raised the possibility that his headaches were due to vascular problems. *Id*. In regards to memory loss, Dr. Mathew stated that such problems usually clear up after a year and opined that Claimant suffered from "tremendous

psychological overlay to his symptoms." *Id*. Dr. Mathew recommended that Claimant take prescription drugs for his headaches, anti-depressants, anti-anxiety medication, and undergo pain management. *Id*. Furthermore, Dr. Mathew opined that Claimant should not return to regular work in a shipyard, cited the need for vocational rehabilitation in a field where Claimant could reduce his mental strain, and stated the Claimant had not reached maximum medical improvement.

C(7) Medical Records of Dr. Robertson

On May 19, 1999, Dr. Robertson, a clinical psychologist, performed a psychological assessment of Claimant on the referral of Dr. Foster. (EX 32, p.1). Dr. Robertson's diagnosis was based in part on a social history that Claimant was an average high school student, did not enroll in special classes, and had dropped out of a college engineering program to get married. *Id*. at 3. In a mental status exam Claimant was able to focus his attention, speak logically and coherently, effectively read and write, have immediate recall memory, have delayed auditory memory of seventy-five percent after thirty minutes, and have eighty-percent visual memory. *Id*. Dr. Robertson detected: a severe deficit in the ability to sustain attention; a moderate impairment in abstract reasoning, problem solving, and tactile performance test; a mild impairment in delayed visual memory, as well as reduced visual fields, reading ability of a tenth grader, spelling ability of a fifth grader, mathematical ability of a seventh grader; and an IQ of 101. *Id*. at 3-6. A personality examination revealed that Claimant viewed himself as damaged, and that Claimant had major thought disturbances to the point of disorientation, and had an overall profile consistent with post-concussion disorganization. *Id*. at 7.

In total, Dr. Robertson estimated that Claimant suffered from a moderate degree of impairment affecting ninety percent of his neuropsychological functions, and damage to his frontal, right posterior frontal, anterior parietal, and left occipital regions, which may be due in part to a peripheral cervical injury. *Id*. Dr. Robertson recommended an aggressive treatment for Claimant's chronic pain, anxiety and depression. *Id*. at 8. Claimant's problems of attention, energy, anxiety and depression were all treatable components, but, Dr. Robertson opined that Claimant was not able to return to his prior occupation or any high risk occupation. *Id*. Specifically, Dr. Robertson stated that Claimant should not work around heights or dangerous machinery. *Id*. Dr. Robertson also recommended neurological treatment, pain management, anti-anxiety and depression medication, psychotherapy, and cognitive therapy. *Id*. Dr. Robertson further opined that Claimant's ultimate capacity to return to work could not be determined until he had another year of treatment, and even then he would likely require vocational rehabilitation. *Id*.

C(8) Medical Records of Dr. Goebel

Dr. Goebel, a psychologist, examined Claimant on June 17-18, 1999, to perform a second opinion neuropsychological evaluation. (Ex 33, p.1). Dr. Goebel performed the same test as Dr. Robertson and Claimant stated that he "did better this time." *Id*. Dr. Goebel also noted in his history that Claimant graduated high school with a "C" average. *Id*. Claimant related to Dr. Goebel that his vision and frequency of his headaches were improving, and stated his chief complaints as irritability and memory loss. *Id*. at 2. Claimant's neuropsychological results, however, were greatly different than Dr. Robertson's, doing much

better on some test and much worse on others. *Id*. While noting that Claimant did not show evidence of malingering, several tests designed to reveal that effect generated borderline results. *Id*. at 2-3. These tests, along with the variability in results from Dr. Robertson's administration, suggested that Claimant had a considerable psychological overlay to his problems. *Id*. at 3. Also, Dr. Goebel opined that test results revealed some exaggeration of symptoms as part of a "cry for help." *Id*.

In regards to returning to work, Dr. Goebel stated that the longer he was removed from the work-force the more his self confidence would decline. *Id*. Dr. Goebel recommended an immediate program of cognitive rehabilitation, lasting three to six months, followed by a repeat neuropsychological examination. *Id*. Dr. Goebel conducted a repeat neuropsychological assessment on December 6, 1999. (EX 37, p.1). Dr. Goebel noted that Claimant had shown significant improvement in his performance IQ, and other improvements suggested that Claimant was now functioning in the mild range of organic brain impairment. *Id*. at 2. Claimant also exhibited improvement in concentration, cognitive ability logical reasoning, and memory. *Id*. Claimant's emotional condition, however, did not show any changes, which contributed to Claimant's overall poor neuropsychological functioning. *Id*. at 2-3. Dr. Goebel further opined that there was no evidence of malingering, as Claimant was both motivated and hard-working. *Id*. at 3. Claimant also reported that many of his symptoms had cleared, but he continued to suffer from severe two-to-four hour debilitating headaches which occurred about once every other day. *Id*. Dr. Goebel recommended that Claimant attend pain management, and agreed with Dr. Patterson that Claimant's headaches were the largest obstacle to returning Claimant to work. *Id*. Dr. Goebel recommended another three months of neurofeedback, and cited a need for neuropsychological rehabilitation. *Id*.

C(9) Medical Records of Dr. Lopez

On February 1, 2000, Claimant began pain management treatment under Dr. Lopez. (EX 41, p.66). Claimant described his pain as burning, sharp and shooting, rating the severity of his pain between three and ten. *Id*. at 72. Claimant also related that the color red caused him headaches and that total darkness without any sound made his pain subside. *Id*. at 74. Dr. Lopez opined that Claimant suffered from migraines and the agitation on seeing the color red may be a result of seizure type activity. *Id*. at 90. On March 1, 2000, Claimant indicated that a prescription of Topomax and Tegretol reduced the frequency and intensity of his headaches, but he continued to have problems with poor memory, poor comprehension and fatigue. *Id*. at 96. On Claimant's next appointment, April 5, 2000, he indicated that the prescription medication continued to decrease the frequency and intensity of his headaches. *Id*. at 103. On July 18, 2000, Claimant indicated that he ran out of prescription medication in June and his debilitating headaches returned in full force, however, he reported their duration as approximately once per week. *Id*. at 107. Dr. Lopez only change in treatment was to change Claimant's prescription. *Id*.

On September 19, 2000, Dr. Lopez noted that Claimant's condition was stable and noted continuing problems of headaches, neck pain and difficulty with mobility. *Id*. at 111. An x-ray of the neck taken on September 19, 2000, however, revealed a normal film. *Id*. at 112. A physical exam conducted on November 28, 2000, revealed that Claimant's speech was slightly broken and that he had difficulty in expressing fully, but Dr. Lopez did not notice any other neurological deficits. *Id*. at 114. By March 13,

2001, Claimant indicated to Dr. Lopez that he continued to suffer headaches, but he felt more in control as his headaches were not nearly as frequent or intense. *Id*. at 119. Dr. Lopez noted, however, that Claimant's speech was slow and Claimant exhibited a decreased processing time. *Id*. There was no change in Claimant's condition at his next appointment on July 17, 2001. *Id*. at 122.

C(10) Medical Records of Dr. Weil

Dr. Weil, a neurological surgeon, issued an independent medical evaluation of Claimant on November 20, 2000. (EX 42, p.1). Claimant reported he suffered severe headaches lasting three to four hours once in a period of several days. *Id*. at 3. Claimant also reported dizziness, disorientation, and a slow thought process. *Id*. After a physical and neurological exam, Dr. Weil concluded that Claimant suffered from post-concussion syndrome that had not created any specific neurological deficit. *Id*. at 4. Dr. Weil further opined that Claimant exhibited a significant psychological overlay and indicated that further psychiatric management was necessary with the prescription of anti-depressants. *Id*. From a neurological standpoint, however, Dr. Weil opined that Claimant had reached maximum medical improvement. *Id*. Dr. Weil concluded that with continued attempts to control Claimant's headaches with medication, and with psychological treatment, Claimant would be a good candidate for vocational rehabilitation. *Id*.

C(11) Medical Records of Dr. Ware

Dr. Ware, a psychiatrist and neurologist, conducted a psychiatric evaluation of Claimant on March 28, 2001, at the request of Employer's attorney. (EX 43, p.1). Dr. Ware diagnosed post concussion disorder, possible dysthymia, cerebral concussion with post-concussion syndrome, post-traumatic headaches, with moderate psychological stressors. *Id*. at 2-3. After reviewing Claimant's past medical records, on April 27, 2001, Dr. Ware concluded that Claimant was disabled as a result of his work related injury, but opined that Claimant's subjective symptoms were much greater than all his objective tests and findings, which were all normal, substantiated. (EX 44, p.1). Claimant's main difficulties arose from depression. *Id*. at 2. Accordingly, Dr. Ware stated that he seriously doubted if Claimant had any physical or organic neurological or brain impairment, and related that "his present symptoms are largely, if not completely, on a psychiatric level." *Id*. at 3. Dr. Ware recommended psychiatric treatment, once a week for two or three months and anti-depressant medication to regain his emotional equilibrium. *Id*. Claimant's psychiatric state was not a major impairment, and with proper treatment, Dr. Ware opined that Claimant could return to his former work. *Id*.

On July 16, 2001, Dr. Ware reviewed Dr. Gripon's report and disagreed with his conclusion that Claimant suffered from a cognitive disorder because Claimant did not show any impairment of memory in regard to the mental status examination. (EX 45, p.1). Dr. Ware also disagreed with Dr. Gripon time frame for reaching maximum medical improvement, opining that in his experience, a period of three months, with one psychiatric visit per month to regulate medications and six counseling sessions, was adequate for reaching maximum medical improvement. *Id*. Any longer treatment would only encourage Claimant to remain symptomatic and interfere with Claimant re-entering the workforce. *Id*.

C(12) Medical Records of Dr. Perez

On January 10, 2001, Dr. Perez, a clinical psychologist, issued a neuropsychological and psychological evaluation on the request of Employer's attorney. (EX 47, p.1). In making his determination, Dr. Perez used Claimant's high school academic record as a standard to interpret Claimant's test scores. (Tr. 165; EX, 65). Claimant's main complaints to Dr. Perez were headaches, dizziness and loss of memory, but Claimant stated that he stayed busy and had "pretty much learned to live with [the symptoms] after two years." *Id*. at 2.

Dr. Perez tested Claimant's IQ at 101, and found no impairment in his memory function. *Id*. at 5. Likewise, Claimant's language functioning was normal as was his perceptual motor functioning. *Id*. at 6. An academic functioning test revealed that Claimant's ability in spelling and arithmetic was at the sixth to seventh grade level and Claimant could read on a high school level. *Id*. A personality functioning test revealed that Claimant had a chronic problem of maladjustment and reflected evidence of symptom magnification and somatization. *Id*. at 4, 6. Dr. Perez concluded that Claimant had some secondary gain issues, but from a neurological standpoint, Claimant was neither impaired nor disabled, and was fully capable of returning to employment. *Id*. at 7. Furthermore, Dr. Perez stated that continued neurofeedback treatments by Dr. Patterson were reinforcing disability behaviors, and Dr. Perez stated that he did not expect any significant changes as long as litigation continued. *Id*. at 7.

On March 31, 2001, Dr. Perez reviewed the report of Dr. Patterson to issue an opinion on the reasonableness and necessity of psychological treatment. (EX 48, p.1). Dr. Perez stated that unlike Dr. Patterson, he found no neurological impairment, and stated that Dr. Patterson's psychological assessment failed to measure Claimant's degree of depression. *Id*. Dr. Perez further stated that the psychological testing Dr. Patterson identified clearly demonstrated a psychological presentation of somatic concerns and secondary gain. *Id*. In Dr. Perez's opinion, based on his own neuropsychological and psychological testing, there was no effective treatment for Claimant's behavioral presentation as long as litigation was pending. *Id*. at 2. Accordingly, the recommended treatment by Dr. Patterson was neither reasonable nor necessary as it related to a compensable injury, and such treatment reinforced disability behaviors of Claimant. *Id*.

C(13) Vocational Rehabilitation Assessment

On August 31, 2001, Mr. Quintanilla, a rehabilitation counselor from Rehabilitation Resources, Inc., conducted a vocational rehabilitation assessment of Claimant. (EX 50, p.1). Based on the opinions of Drs. Perez and Ware, Claimant could return to his former employment and there would be no loss of wage earning capacity. *Id*. at 10. If for any reason Claimant could not return to his former employment, then Mr. Quintanilla noted Dr. Patterson's opinion that Claimant needed employment that was "1) self-paced, 2) low stress, 3) low in demand of speed of information processing, 4) low in demand for rapid reaction times, 5) compatible with medications, [6] compatible with transferable skills, and [7], low in demand for social skills." *Id*. Examples of such jobs included parking lot attendant, laundry worker, home care attendant and kitchen helper, all jobs that fell in the light or medium level of physical demands. *Id*.

Such jobs paid seven dollars an hour on average. *Id*. at 11. With twelve to eighteen months of on the job training, however, Mr. Quintanilla stated that Claimant could earn ten to twelve dollars an hour in jobs commensurate with Dr. Patterson's limitations. *Id*. On October 3, 2001, Mr. Quintanilla wrote an addendum to his labor market survey based on the opinion of Dr. Perez, identifying jobs as a Welder/Fitter Supervisor earning between $7.00 and $14.42 per hour. (EX 72, p.1-2).

C(14) Medical Records of Dr. Gripon

Dr. Gripon, a forensic psychiatrist and neurologist, performed a psychiatric evaluation of Claimant on June 8, 2001. (EX 53, p.1). A mental status evaluation revealed that Claimant had some difficulty in recalling past events, and his mood exhibited signs mild depression. *Id*. at 2. Claimant stated that he had difficulty with retention and became lost even attempting to drive around his home area. *Id*. Claimant also reported that he was sluggish, dizzy, clumsy, and stated that his biofeedback with Dr. Patterson "might have helped." *Id*. at 2-3. Dr. Gripon diagnosed a cognitive disorder, dysthymia S/P head injury, and a current inability to return to work. *Id*. at 2. In regards to treatment, Dr. Gripon recommended psychoactive medication and outpatient psychotherapy for nine to eighteen months, at a frequency of once every other week. *Id*. at 3.

On September 24, 2001, Dr. Gripon reported that Claimant appeared "totally spacey" and tended to stare and take a long period of time when asked simple questions. (CX 8, p.1). Claimant stated that he was having cognitive difficulties, trouble retaining information, and Dr. Gripon placed Claimant on Prozac to enhance his cognitive ability. *Id*. Also, Dr. Gripon stated that he wanted to place Claimant in some supportive and directive short term psychotherapeutic work to see if that would help Claimant return to gainful employment. *Id*. On October 16, 2001, Dr. Gripon reiterated his diagnosis of Cognitive Disorder, Dysthymia and "S/P Head Injury", and stated that it was "far too early to have any reasonable or probable idea as to his potential degree of response/recovery." (CX 23, p.1-2). He expected Claimant to respond to treatment, if at all, within the next six to nine months. *Id*.

C(15) Deposition of Dr. Patterson

Claimant took the deposition of Dr. Kip Patterson, Claimant's treating clinical psychologist, on September 19, 2001 and September 26, 2001. (CX1, p.1). Dr. Patterson stated that whenever a person is rendered unconscious by a blow to the head that individual experiences at least "seven G's" (seven times the force of gravity) which is associated with an undetermined amount of kinetic energy. *Id*. at 11. The kinetic energy passes through the brain in a pressure wave disrupting the lipid molecules that make up the nerve membranes in the brain - causing them to lose integrity - resulting in apoptosis, or the destruction of brain cells. *Id*. at 14-16. Also, when enough force is administered to the brain "axonal shearing" occurs, or the tearing of nerve cell connections, which creates a disruption of theta activity, or the process of establishing connections between brain cells. *Id*. at 20-21. Dr. Patterson's neurofeedback is a method of counteracting the cell disconnection associated with theta activity because it sends signals to brain cells to behave in a certain way and create new connections. *Id*. at 21-22. Thus, there is a psychological basis for Claimant's behavioral complaints that appear psychiatric in nature. *Id*. at 21.

At his initial interview on March 1, 1999, Dr. Patterson thought Claimant exhibited enough signs of post-concussion syndrome for that to be an accurate diagnosis. *Id*. at 7-12. Dr. Patterson's last visit with Claimant occurred on March 1, 2001, not because Dr. Patterson's treatment was finished, but because Carrier refused to authorize continued therapy. *Id*. at 23. Over Claimant's seventy plus sessions, Dr. Patterson stated that neurofeedback helped Claimant some, but part of Claimant's problem was chronic pain, which also disrupted brain cell connections created through theta activity. *Id*. at 23-24.

Concerning the absence of any objective finding of brain injury, Dr. Patterson stated that it was not surprising because an MRI of the brain is not accurate since the image is insufficient to differentiate between damaged cells and undamaged cells. *Id*. at 124. In a quantitative MRI it is possible to find dramatic differences in persons who had suffered brain injuries, but the technology and knowledge had yet to filter into practice on a meaningful way. *Id*. at 124-25.

Claimant's chronic pain first interfered with his therapy in June 2000, when Claimant ran out of pain medication and experienced a one-to-two week period of chronic pain fueling his depression. *Id*. at 24-27. Dr. Patterson adamantly requested anti-depressant medication from Carrier, but Carrier would not issue approval. *Id*. at 27-28. Dr. Patterson also experienced delays by Carrier in approving his treatments up to March 1, 2001, which had a disruptive affect on Claimant's progress. *Id*. at 33. Dr. Patterson categorized Carrier's delays as gross negligence. *Id*. at 33-34.

In Dr. Patterson opinion, failure to treat Claimant's depression caused further brain injury because depression creates an exacerbation of theta activity. *Id*. at 35. Thus, according to Dr. Patterson, Claimant entered into a vicious circle where his inability to perform due to a brain injury caused depression and anxiety, which further caused brain deterioration, which further impaired his ability to perform, which caused greater depression and anxiety. *Id*. at 38.

Regarding employability, Dr. Patterson stated that Claimant was not capable of returning to his former job. *Id*. at 42. Dr. Patterson also labeled Claimant as impaired under the social security criteria for organic brain disorders. *Id*. at 43. Future employment would be dependent on re-training and very specific placement. *Id*. Performing menial jobs, such as ditch digging, would further Claimant's depression because it would only remind him of his former sophisticated position and deepen his depression. *Id*. at 44. Similarly, Dr. Patterson did not believe that jobs such as parking attendant were appropriate because it involved arithmetic and managing money. *Id*. at 45. Housekeeper would be inappropriate because Claimant has a difficult time keeping track of what he is doing. *Id*. at 45-46. A position as a laundry worker would be suitable only if there was not a high level of stimulation in the working environment. *Id*. at 46. An assembler of small products and kitchen helper were inappropriate jobs because Claimant would have a difficult time keeping pace with the assembly line. *Id*. at 46, 48. Home care attendant would be a "disaster" because Claimant would not do well trying to meet the emotional needs of another. *Id*. at 48. A hospital cleaner would also be inappropriate because Dr. Patterson opined that Claimant would likely forget something important. *Id*. at 49.

Dr. Patterson stated that further neurofeedback would help Claimant, but he understood criticism of the technique because such treatment is relatively unknown. *Id*. at 50. The scientific basis for neurofeedback is that it alters the electrical activity of the brain - providing the brain with information about its own electrical activity - which can result in a change of electrical patterns. *Id*. at 83. Although the normal number of sessions Dr. Patterson performs before terminating treatment as ineffective is between thirty and fifty, *id*. at 84, such sessions would continue as long as Claimant thought the process was benefitting him. *Id*. at 78. In addition to continued neurofeedback, Claimant needed psychotherapy and supporting chemotherapy. *Id*. at 51.

D. Testimony of Employer's Witnesses

D(1) Deposition and Hearing Testimony of Dr. Ware

Employer's attorney took the deposition of Dr. Ware on September 17, 2001, a dual specialist in neurology and psychiatry. (EX 64, p.1, 5). Dr. Ware also testified at trial on behalf of Employer. In regards to Claimant's injury, Dr. Ware opined that Claimant had indeed suffered a cerebral concussion with post-concussion syndrome and post-traumatic headaches. *Id*. at 30. Dr. Ware also stated, however, that with any concussion or brain trauma, damage is immediate and, unless there was progressive involvement, a patient would not become worse off because the brain would heal itself to its maximum ability from the time of the injury forward. *Id*. at 20. Dr. Ware stated that concussions usually cause retrograde amnesia, and the fact that Claimant remembered talking with some other workers slightly before his accident occurred, and remembered the ambulance ride to St. Patrick Hospital, indicated to Dr. Ware that his concussion may not have been severe because Claimant could have had a loss of consciousness for five minutes, then suffer confusion for three minutes, with an alteration in consciousness from the time of his injury to an hour or an hour and a half later. (Tr. 191-92; EX 64, p.11-12). For most concussions, all symptoms resolve after six months at which time the brain has completely healed. (Tr. 201). Thus, six months after the accident, Claimant should have been able to return to work. (Tr. 201-02). Also significant was the fact that Claimant was showing improvement in his headaches with the use of the prescription drug Tegretol, which serves as an anti-convultsant, mood stabilizer, and impulse control catalyst. (EX 64, p.13).

None of Claimant's physical tests, a CAT scan, MRI, electromyogram, EEG, or brain map, indicated physical or objective evidence of damage to the nervous system or to the brain from the concussion that he sustained. *Id*. at 19-20. The only transitory objective abnormality was reported by Dr. Foster, who noted some difficulty with coordination, but Dr. Ware stated that the finding had to be eliminated as extraneous because if the symptom was caused by the brain the symptom would have been present on Claimant's earlier and next evaluations. (Tr. 197; EX 64, p.20).

In regards to the improvements Claimant exhibited between Dr. Goebel's two neuropsychological evaluations, Dr. Ware stated that the results indicated that Claimant's brain was healing and data indicating mildly abnormal responses indicated that some of his impairment was due to emotional factors. (EX 64,

p. 24). Dr. Ware downplayed the significance of any repeat improvement in neuropsychological testing because the tests takes six to eight hours to administer, are very elaborate, and the tests are performance oriented so an individual could only improve a little with practice. *Id*. at 49. Likewise, after reviewing Claimant's deposition taken in November 2000, Dr. Ware stated that Claimant's self-described activities of fishing, driving, and welding were inconsistent with the amount of impairment Claimant described. *Id*. at 26.

Dr. Ware stated that Dr. Patterson's biofeedback therapy was a technique for treating Claimant's cognitive problems, but noted the Dr. Patterson's counseling was significantly limited because no attempt was made at family integration and Dr. Patterson could not provide prescriptions for anti-depressant medication which would be helpful regarding memory, concentration and focus. *Id*. at 30. Dr. Ware admitted, however, that because Claimant believed that Dr. Patterson's therapy helped, and the therapy helped Claimant to relax, such treatment benefitted Claimant's psychological state. *Id*. at 54.

Dr. Ware also disagreed with Dr. Gripon's diagnosis of cognitive disorder because the most accurate measure of cognitive disorder is neuropsychological testing, and Dr. Gripon never performed such testing, (Tr. 211), but Dr. Ware agreed diagnostically in Dr. Gripon's conclusion of depression. (EX 64, p. 34). Also, Dr. Ware stated that the time period necessary for Claimant's psychiatric treatment was much less than the nine months to eighteen months recommended by Dr. Gripon. *Id*.

When Dr. Ware examined Claimant on March 28, 2001, he determined that Claimant memory was functioning properly because Claimant was able to repeat six digits froward and four digits backwards, which is normal memory functioning. (Tr. 181-85, 187). Claimant demonstrated that he was capable of addition, subtraction spelling, and understanding associations, indicating to Dr. Ware that Claimant was of average intelligence. (Tr. 188). The only evidence Dr. Ware found of cognitive disorder was that Claimant had a small deficit in recording memory, which could also be due to lack of concentration and motivation. (Tr. 198). Furthermore, Dr. Ware stated that Claimant's responses in the courtroom demonstrated that Claimant responded quickly to some questions and slowly to others, and overall the amount of information that Claimant stated he did not remember was inconsistent with his level of functioning. (Tr. 205). In determining if Claimant was suffering from a cognitive disorder, however, Dr. Ware would defer to a neuropsychologist like Dr. Perez. (Tr. 199).

Dr. Ware opined that Claimant did suffer from dysthymia, a mild to moderate depression that lasts over six months, but stated that such patients are still able to work. (Tr. 203; EX 64, p.31). Additionally, not working and being idle is the absolute worse thing that a person can do who is suffering from depression. (Tr. 210). Dr. Ware stated, however, that there were grounds to conclude that Claimant suffered from depression before his workplace accident because Claimant underwent a divorce, loss of a girlfriend, had not seen his child for a long period of time, and failed to financially provide for his child. (EX 64, p. 59-60). Dr. Ware also estimated that twenty to thirty percent of the population at any given time suffers from depression. (EX 64, p. 61). Normally, without treatment a person will overcome depression within one year. (Tr. 232). Dr. Ware stated that headaches could cause both depression and anxiety, and depending on the degree of severity, could impair an individuals ability to function. (EX 64,

p. 41). Dr. Ware stated it was unusual for Claimant to exhibit psychological difficulties for a long time after his accident, which indicated to him that Claimant had not received adequate treatment from Dr. Patterson. *Id*. at 43.

In regards to his own examination of Claimant, Dr. Ware stated that he made the diagnosis of post-concussion disorder, possible dysthymia, cerebral concussion with post-concussion syndrome and post-traumatic headaches in part because Dr. Ware liked to examine his patients without contamination from any contamination from other sources. (Tr. 213-14). On April 27, 2001, after reviewing Claimant's medical records, Dr. Ware recommended that Claimant take anti-depressant medication, undergo psychiatric treatment for two to three months, and he opined that Claimant appeared impaired as a result of his injuries. (Tr. 215). Dr. Ware, however, opined that Claimant could return to work despite the fact that he needed further treatment. (Tr. 216).

Dr. Ware addressed two theories on why Claimant had not returned to work before the accident. First, Dr. Ware opined that Claimant' injuries stem in part from iatrogenic sources because when a physician magnifies symptoms it sends a message to the patient that the difficulty the patient had is serious and the patient takes longer to get well. *Id*. at 35. Second, Dr. Ware stated that the fact that Claimant's workers' compensation claim is still pending encouraged Claimant to dally rather than return to work. *Id*. at 35-36.

Dr. Ware found no reason why Claimant could not return to his former employment after Claimant underwent his recommended treatment. *Id*. at 31. Indeed, many of Dr. Ware's patients who suffer from dysthymia continue working while receiving treatment. *Id*. at 56-57. Specifically, Dr. Ware suggested that Claimant enter a supportive and directive treatment program with counseling once a week for two to three months and have his medication managed. *Id*. at 31-32. The fact that Claimant had suffered from depression for over two and one-half years did not alter Dr. Ware's opinion on the length of treatment. *Id*. at 55. The fact that Claimant had attempted welding once did not indicate a significant effort in getting back to work. *Id*. at 37. Also, Dr. Ware stated that Claimant's efforts to go fishing were not indicative of someone laying around and waiting for a check. *Id*. Concerning Claimant's headaches, Dr. Ware stated that they were his lone remaining symptom from his workplace accident, and those had decreased in severity and frequency, leading Dr. Ware to conclude that they were not incapacitating. *Id*. at 30.

D(2) Testimony of Dr. Perez

Dr. Perez, a faculty member, clinical psychologist, and clinical neuropsychologist, testified concerning his independent evaluation of Claimant and his interpretation of the medical records involved in Claimant's case. (Tr. 106, 108, 110, 114-15). Dr. Perez conducted a clinical interview on January 10, 2001, which lasted an hour and a half, then Claimant underwent a battery of tests by Dr. Perez's cyclomatrician consisting of detailed intelligence, cognition, memory, speech, language, sensory motor, academic and personality tests. (Tr. 115). Dr. Perez considered the fact that Claimant was involved in a third-party lawsuit very important for assessing Claimant's motivation. (Tr.119). Dr. Perez, however

stated that Claimant was cooperative during testing, presented a valid profile and Dr. Perez thought the test produced valid results. (Tr. 121).

Dr. Perez found that Claimant's IQ was in the normal range, and had normal memory functions. (Tr. 122-23). In two tests measuring attention and concentration Claimant had mixed results; on one test he performed poorly and on the second he performed "fine." (Tr. 124). Dr. Perez did not recognize any problems with language or motor skills. (Tr. 124-35). Claimant's academic functioning was on par with his high school record and his scores fell in with what Dr. Perez had expected. (Tr.126). Thus, when Claimant scored in the "below average range" in his working memory test and "far below average to average" in processing speed, those results were normal for him considering his below average academic performance in high school. (Tr. 164-65). In his personality functioning test Claimant produced a profile of chronic maladjustment. (Tr. 126). People with such profiles have a marginal adjustment to life and are difficult to treat medically because they generally complain of more symptoms than objectively exist, and do not respond well to treatment. *Id*.

Regarding post concussion syndrome, Dr. Perez stated that the symptoms usually resolve within a six week period, but have lasted as much as three to six months, and in some cases up to a year. (Tr. 128-29). Dr. Perez found the fact that Claimant was transported to Business Health Partners by a co-worker and not an ambulance puzzling, and noted that there was no clear documentation that Claimant had a concussion. (Tr. 131). Also, the report from St. Patrick indicated that Claimant was alert and oriented. (Tr. 132).

Dr. Perez could not understand the diagnosis of Dr. Robertson, seven months after the injury, that Claimant suffered mild to moderate brain injury when his actual testing data was excellent. (Tr. 133-34). Dr. Perez opined that Dr. Robertson did not have all the necessary records to make such a determination. (Tr. 134). Mainly, that Dr. Perez was able to establish a comparison standard with Claimant's school records which Dr. Robertson did not have. *Id*. Likewise, Dr. Goebel's neurological assessments made no clinical sense when compared to Dr. Robertson's because one with a concussion would improve over time. (Tr. 134-35). Dr. Perez opined that this deterioration was due to malingering, and in fact, Dr. Goebel had borderline results of malingering in his testing. (Tr. 135). Dr. Perez, did not agree with Dr. Goebel's recommendation that Claimant undergo a cognitive rehabilitation program because Claimant was scoring well on this aspect of his neurological testing. (Tr. 159-60).

Dr. Perez stated the neurofeedback treatment given by Dr. Patterson was not an accepted treatment modality. (Tr. 137). Also, Dr. Perez examined Claimant on January 10, 2001, merely two days after Dr. Patterson issued a report stating that Claimant needed immediate hospitalization because of his psychological state, but Dr. Perez saw no such indication in Claimant. (Tr. 138). Furthermore, Dr. Perez stated that Dr. Patterson had lost his objectivity in regards to treatment and had become an advocate instead of a physician. (Tr. 139). Dr. Perez also disagreed with the assessment of Dr. Gripon that Claimant had a cognitive disorder because Dr. Gripon did not conduct the same type of testing that Dr. Perez undertook. (Tr. 158). Likewise, Dr. Patterson's diagnosis of cognitive disorder should not be entitled to any weight because Dr. Patterson never conducted a neuropsychological assessment and Dr.

Patterson is not a neurologist. (Tr. 159).

Based on the medical records that Dr. Perez reviewed, and his own examination of Claimant, Dr. Perez could find no evidence of a true psychological disorder that could be attributed to Claimant's workplace injury. (Tr. 140). Dr. Perez attributed Claimant's depression to boredom from not working. (Tr. 140). The fact that Dr. Patterson made no effort to return Claimant to work helped reinforce Claimant's disability. (Tr. 141). Dr. Patterson reinforced Claimant's disability because, an authoritative figure legitimized Claimant's complaints and his treatment process reinforced Claimant's belief process in his disability. (Tr. 174). Dr. Perez did admit that Claimant likely suffered a concussion, however, he found no evidence of any neuropsychological injury beyond a mere concussion. (Tr. 142). A concussion does not cause irreversible brain injury and Claimant should have reached maximum medical improvement three to six months after the accident, and most probably did so within six weeks. (Tr. 143). Thus, Claimant could resume his former employment. *Id*. Similarly, Dr. Perez found no way to related Claimant's current complaints of depression to his workplace accident. (Tr. 145).

(D)(3)Testimony of Mr. Quintanilla

After writing his vocational report in the record, Mr. Quintanilla reviewed depositions from Drs. Ware and Patterson, and recent medical reports by Dr. Gripon. (Tr. 248). On October 3, 2001, Mr. Quintanilla conducted a labor market survey identifying welding jobs available in Claimant locality paying between seven and eight dollars an hour. (Tr. 250-51). Some of the jobs, however, were not in Claimant's locality, but were in the vicinity of Claimant's previous employment in the Beaumont/Port Arthur area. (Tr. 255). Mr. Quintanilla would not recommend traveling over fifty miles to reach a minimum wage because that would not be economical. (Tr. 284). Should Claimant not return to work as a welder, Mr. Quintanilla identified "light" positions," lifting over twenty-five pounds occasionally and lifting ten pounds frequently, with pay rates ranging from $5.15 per hour to $6.50 per hour. (Tr. 253-55). All jobs he identified were entry level and unskilled positions. (Tr. 256).

When confronted with Dr. Patterson's deposition testimony that Claimant could not perform such jobs as a parking lot attendant, Mr. Quintanilla stated that he did not agree with such an assessment of Claimant's abilities because Dr. Patterson was a psychologist and not a vocational rehabilitation specialist. (Tr. 268). Dr. Patterson has no idea of the different parking lot type of jobs available. (Tr. 268). Mr. Quintanilla specifically took into consideration Dr. Patterson's restrictions in his labor market survey, and after reading Dr. Patterson's report where Dr. Patterson denied that Claimant could do any of Mr. Quintanilla's suggested jobs, Mr. Quintanilla disagreed stating that every job he mentioned met Dr. Patterson's stated restrictions. (Tr. 274). Memory loss would not be a problem in the jobs Mr. Quintanilla identified consistent with Dr. Patterson's restrictions because al the identified jobs were repetitive on a daily basis. (Tr. 276).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he continues to suffer from an injury to his brain, which caused depression, resulting in a total inability to return to work. Alternatively, Claimant asserts that he has a permanent partial disability that severely limits his ability to seek and maintain even minimal employment. Claimant also argues that his subjective pain alone, even if unaccompanied by "objective" medical evidence is enough to establish his disability. Claimant further contends medical benefits to treat his psychological overlay should continue and Employer/Carrier's refusal to timely treat Claimant's depression, and its termination of medical benefits after he hearing, was wrongful especially in light of the fact that Claimant had not reached maximum medical improvement. Finally, Claimant contends that Employer's compensation payments were not commensurate with his actual earnings, arguing that his average wages totaled $936.74 per week with a corresponding compensation rate of $624.00 per week.

Employer contends that Claimant reached maximum medical improvement with no residual impairments on or before April 15, 1999. Employer further urges the court to discredit the testimony of Claimant, Dr. Patterson, and Dr. Gripon, and asserts that Claimant's current condition is not work related. Arguing that Employer is entitled to substantial credit since Claimant was wrongfully paid continuing disability, Employer asserts that the issue of Claimant's average weekly wage is moot. In the alternative, Employer asserts that under section 10(c), Claimant's average weekly wage is $773.84 with a corresponding compensation rate of $515.89. Also in the alternative, Employer asserts that it has established suitable alternative employment.

B. Credibility of Parties[2]

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968); *Louisiana Insurance Guaranty Ass's v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. and Hartford Accident &*

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[2] Employer attacked the credibility of Drs. Patterson and Gripon, and Claimant attacked Drs. Perez and Ware's testimony and records as being inconsistent. While the record contains some inconsistent statements, I do not find that any of the above parties purposefully tried to mislead or lie to the Court. To the extent the physicians gave inconsistent statements, those inconsistencies reflect upon the degree that they issued a "well-reasoned medical opinion" when comparing the medical evidence in determining the nature and extent of Claimant's injuries.

Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999). The Act must be construed liberally in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S. Ct. 88, 98 L. Ed. 5 (1953); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1043 (5th Cir. 1992); *Port of Portland v. Director, OWCP*, 192 F.3d 933, 939 (9th Cir. 1999), *cert denied*, 529 U.S. 1086, 120 S. Ct. 1718, 146 L. Ed. 2d 640 (2000); *Machado v. General Dynamics Corp.*, 22 BRBS 176, 181 (1989).

Here, there are several inconsistencies in the records regarding Claimant's testimony, statements of third parties, and the objective medical evidence. Perhaps most troubling in light of Claimant's four neuropsychological tests, and Dr. Patterson's neuropsychological rehabilitation, is the fact that Claimant misrepresented mental ability/academic achievement prior to his injury. Claimant told Drs. Robertson, Patterson, and Goebel that he was an average student (CX 1, 66-68; EX 32, p.3; EX 33, p.1), when in fact his high school grade report established that Claimant graduated 295th of 304 students.[3] (EX 65, p.2). Claimant also misrepresented the truth to Dr. Robertson when he related that he had no children when in fact Claimant has a four year old daughter - a potentially relevant factor in diagnosing of depression.[4] (Tr.

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[3] Claimant contends that after his accident he was no longer able to compute the mathematical calculations that he undertook prior to his injury. Claimant's high school records, however, reveals that Claimant never had academic success with math. Claimant received the following grades:

Ninth Grade (1981-82) Math I - "D"
Tenth Grade (1982-83) Math II - "U" (later changed to a "C")
Summer School (1983) Math III - "C"
Tenth Grade (1983-84) Consumer Math - "U"
Eleventh Grade (1984-85) Consumer Math - "D"
Twelfth Grade (1985-86) Algebra I PH 2 - (No grade assigned nor credit given)

(EX 65, p.2).

[4] Employer identified other instances in the record to impeach Claimant's credibility. For example, Employer stated that Claimant lied to Dr. Lopez about having one to four years of college experience, but a review of the record indicates that Claimant did attempt one semester of college and the form he filled out for Dr. Lopez did not have box to check for education between high school and one to four years of college. (Tr. 65; EX 41, p.82). Likewise, Employer points to Claimant's statement that he voluntary limits his driving, has difficulty driving, and is a risk to other drivers on the road as evidence for discrediting Claimant because there is no evidence to support such claims. (Tr. 55; EX 31, p.1; EX 32, p.8; EX 39, p.1). Claimant, however, never testified that he could not drive,

86, 210; EX 32, p. 3, 8). The fact that Claimant misrepresented the scope of his scholastic achievement and denied having a child casts suspicion on the veracity of Claimant's testimony, but in view of the entire record and my observation of Claimant's demeanor, I find that such evidence is not sufficient to impeach Claimant's credibility.

C. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a Claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, the initial determination I must make is under which of the alternatives to proceed.

(C)(1) Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment . . . whether for the same or another employer, during substantially the whole year immediately preceding his injury". 33 U.S.C. § 910(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990).

Claimant's wage records from Employer reflect that Claimant began work on March 9, 1998, (EX 59, p.1), and Claimant's injury occurred on Thursday, October 14, 1998. (EX 3, p.1). Claimant testified

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only that he had difficulty. (Tr. 54-57).

Other inconsistencies in the record concerned Claimant's reports of poor coordination, (Tr. 43), a symptom confirmed by Dr. Patterson, (EX 24, p.14), but refuted by Drs. Mathew and Lopez. (EX 28, p.2; EX 41, p. 90, 111, 122). Also, Claimant reported to Drs. Foster, Patterson, and Robertson that his vision was impaired, but Claimant stated that he had no vison problems on a February 1, 2000 symptom form checklist and never sought medical attention from an optometrist. (Tr, 88-89; EX 13, p.1; EX 24, p.9-11, 19; EX 32, p.4; EX 41, p.84). Neither a difference of opinion between Claimant's medical providers, nor a failure to seek proper medical attention, or to check the appropriate box establishes a conclusive case impeaching Claimant's credibility.

Employer's arguments for impeaching Claimant's credibility based on the fact that Claimant states he has a problems with his memory and yet is able to recall specific events, and arguments concerning Claimant's daily activities in light of his stated impairments are more properly considered *infra* as they relate to the nature and extent of Claimant's impairments.

that he went back to work on October 16, 1998, but was unable to work, thus, I do not include this day in making a wage determination. (Tr. 50). Accordingly, Claimant was employed for 221 days, or 31.57 weeks. During this time Claimant worked a total of 1,355 regular hours and 649.50 overtime hours. (EX 59, p.11).

Jurisprudence interpreting Section 10(a) establishes the meaning of "substantially the whole year." *See Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148, 155 (1979)(finding that 33 weeks was not substantially the whole year); *Stand v. Hansen Seaway Service, Ltd.*, 9 BRBS 847, 850 (1979)(finding that 36 weeks is not substantially the whole year); *Mallory v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 516, 519 (1999)(ALJ)(finding that a person who works less than half the preceding year cannot be said to have worked "substantially the whole year"). *Cf. Eleaver v. General Dynamics Corp.*, 7 BRBS 75, 79 (1977)(finding 28 weeks of employment sufficient because claimant's work was regular and continuous); *Amon v. Ceres Marine Terminal*, 2001-LHC-0295, n.4; 2001 WL 1451099 *4 (DOL Ben. Rev. Bd. 2001)(ALJ)(indicating that 28.43 weeks was substantially the whole year considering claimant's work was "continuous and uninterrupted").

Employer contends that the 31.57 weeks Claimant worked are insufficient to establish that Claimant worked "substantially the whole year." The cases Employer relies on to support that proposition, however, are inapposite. In *Lozupone*, 12 BRBS at 155-56, the ALJ used Section 10(a), characterizing Lozupone's work as permanent and steady, when in fact Lozupone's work was neither permanent nor steady, as reflected by eight week gaps in employment. Similarly, in *Stand*, 9 BRBS at 850, the claimant was engaged in seasonal employment making Section 10(a) inappropriate. Here, Claimant worked a total of 2004.5 hours over 31.57 weeks, for an average of nearly 63.49 hours per week. Accordingly, I find that Claimant's employment was permanent, regular, continuous, and uninterrupted making Section 10(a) the appropriate method to determine Claimant's average weekly wage.[5]

Over the 221 days, or 31.57 weeks that Claimant worked, he made $30,177.13.[6] If Claimant was

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[5] Evidence at trial established that Claimant received a promotion shortly after being hired by Employer. To the extent that a promotion might increase a claimant's average weekly wage calculation, the necessary evidence is not ascertainable from the wage records. *See Lozupone v. Lozupone & Sons*, 14 BRBS 462, 464-65 (1981)(stating that a determination of wage earning capacity must include recent pay increases and a reasonable method of calculating wage earning capacity is to multiply the wage at the time of the injury by the number of hours normally available to the claimant).

[6] Claimant also received per diem payments of $573.75 and a safety bonus of $100.00, but there is not a sufficient basis in the record to make a determination of whether these per diem payments and the safety bonus should be calculated into Claimants average weekly wage. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 433 (5th Cir. 2000); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 479 (5th Cir. 2000); *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 330 (4th Cir. 1998); *Roberts v. Custom Ship Interiors*, 35 BRBS 65, 68 (2001).

a five-a-day worker that computes to daily wage of $189.79 ($30,177.13 divided by 159 working days), and an annual income of $49,345.40 (189.79 x 260). If Claimant was a six-a-day worker that computes to a daily wage of $158.83 ($30,177.13 divided by 190 working days), and an annual income of $47, 649.00. ($158.83 x 300 working days). Claimant's wage records do not provide adequate means to determine whether Claimant was a five a day or a six a day worker, and the issue was not addressed at hearing. In Claimant's brief, counsel asserted that Claimant was a six a day worker and since this represents the lesser of the two sums, I find that Claimant qualified as a six a day worker. Thus, Claimant's average weekly wage was $916.32, (47,649.00 divided by 52 weeks) which has a corresponding compensation rate of $610.88.

D. Claimant's Current Condition - Causation

(D)(1) Section 20 Presumption

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Addison v. Ryan Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986). To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work-related accident or that the work-related accident did not aggravate Claimant's underlying condition. *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition.[7] *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966); *Kubin*, 29 BRBS at 119.

It is well-settled that a psychological impairment can be an injury under the Act if it is work-related. *Director, OWCP v. Potomac Elec. Power Co.*, 607 F.2d 1378 (D.C. Cir. 1979); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *American National Red Cross v. Hagen*, 327 F.2d 559 (7th Cir. 1964). Psychological impairments have included depression due to a work-related disability, *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984), anxiety conditions, *Moss v. Norfolk Shipbuilding & Dry Dock Corp.*, 10 BRBS 428 (1979), and headaches, *Spence v. ARA Food Service*, 13 BRBS 635 (1980). Where a work-related accident has psychological repercussions it is also compensable. *Tampa Ship Repair & Dry Dock v. Director, OWCP*, 535 F.2d 936 (5th Cir.

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[7] Here, it is undisputed that Claimant suffered a workplace accident on October 15, 1998, when a four foot scaffold rod dropped over twenty feet and struck Claimant in the head. (Tr. 49; CX 4, p.1; EX 13, p.1). Also undisputed is the fact that Claimant was injured in the course and scope of his employment under and employer-employee relationship. (AJX 1).

1976); *Tezeno v. Consolidated Aluminum Corp.*, 13 BRBS 778 (1981); *Moss v. Norfolk Shipbuilding & Dry Dock Corp.*, 10 BRBS 428 (1979).

D(1)(a) Prima Facie Case

To establish the right to invoke the Section 20(a) presumption, Claimant must show that he suffered some harm or pain as a result of a work-related accident or as a result of working conditions. *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687 (5th Cir. 1999); *Merril v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991). Specifically, a claimant has the burden of establishing only that: (1) he sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984).

Claimant asserts that his current psychological problems were caused by his workplace accident and occurred as a result of his inability to return to work.[8] Claimant's contentions are supported by numerous authorities in the record relating his depression to his workplace accident. For example, Dr. Patterson diagnosed depression; Dr. Mathew determined that Claimant suffered from depression, and Dr. Ware stated that Claimant had dysthymia. (EX EX 24, p.17; EX 44, p. 1-2). Accordingly, Claimant has established that he suffered a workplace accident and established that he suffered some harm as a result of that accident establishing a *prima facie* case of causation under Section 20.

D(1)(b) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc.*, 194 F.23d at 687-88 (citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

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[8] In regards to Claimant's three main diagnoses of cognitive disorder, dysthymia, and pain disorder, Employer only introduced evidence to demonstrate that Claimant's depression was not caused by his workplace accident. Employer argued that Claimant's cognitive disorder and pain disorder, if any, had resolved shortly after Claimant's workplace accident, and as such those issues are dealt with *infra* concerning the nature and extent of Claimant's injuries.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)(stating that the hurdle is far lower than a "ruling out" standard).

At hearing, Employer introduced evidence that Claimant's depression, could have been a result of other events in Claimant's life. For example, during Employer's direct examination of Dr. Ware, Employer elicited the following information concerning depression and pre-injury events in Claimant's life:

> Q Okay. Back to complaints of depression and so forth, I just want to see if some of these are situations that can cause depression in people that have not suffered any type of concussion or head injury. Interpersonal relationships - - problems with girlfriends?
>
> A Very definitely.
>
> Q Divorce?
>
> A One of the highest on the list.
>
> Q Not seeing a daughter in over four years, no contact?
>
> A Well, that certainly would be a stress and depressing if you cared for your daughter.
>
> Q Not making Court-ordered support payments for your child?
>
> A Well, that one I don't quite understand, but I would think you'd be worried about them coming after you for that.

(Tr. 210-11). *See also* (Tr. 146-148)(Dr. Perez); (EX 64, p.61)(stating that twenty to thirty percent of the population at any given time suffers from depression).

Accordingly, Employer has presented "substantial evidence" that Claimant's depression could be caused by other pre-injury events in Claimant's life, namely, a divorce, interpersonal relationship problems, not seeing his child in four years, and failure to obey a court-ordered child support decree. Thus, Employer has rebutted the Section 20(a) presumption that Claimant's depression is caused by his work-place injury.

C(3) Causation on the Basis of the Record as a Whole

Once the employer offers sufficient evidence to rebut the Section 20(a) presumption, the claimant must establish causation based on the record as a whole. *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1981). If, based on the record, the evidence is evenly balanced, then the employer must

prevail. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994).

A review of the record as a whole establishes by a preponderance of the evidence that Claimant's depression is related to his workplace accident. First, Dr. Ware's testimony under direct examination concerning causes of depression continued:

> Q What about just not working?
>
> A Well, not working . . . Not working and being idle and doing nothing is the absolute worst thing you can do. That is I think almost anyone. . . We see this all the time in people who retire and then they don't have structure in their life and that's the one thing that's different, they no longer work and they start to get depressed. We see that all the time because they don't have a structure and something to do.

(Tr. 210-11).

Likewise, in Dr. Perez's testimony, he stated that there was no test that could isolate the cause of depression, and to do so a psychiatrist would need to gather a lot of information and even then pinpointing a source would not be very accurate. (Tr. 147-48). Furthermore, there is no evidence that Claimant was depressed or had ever sought help for depression prior to his workplace injury. Indeed, Dr. Perez directly attributed Claimant's depression to the fact that Claimant was not working.[9] (Tr. 140). Therefore, based on the record as a whole, Claimant has established by a preponderance of the evidence that the source of his depression was his workplace injury.

E. Reasonableness and Necessity of Psychiatric Treatment

Claimant contends that Employer wrongfully terminated medical benefits for Claimant's psychiatric treatment the day after the hearing. Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision

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[9] At trial Dr. Perez testified that "there's some indication that [Claimant] may have an underlying depression, but that is not related in his life history. Also, I think it is related to boredom. I think it is related to not working." (Tr. 140). Later, however, Dr. Perez stated that based on a reasonable psychological probability, there was no way to relate Claimant's current complaints of depression to his workplace accident. (Tr. 145). This latter statement is not supported by the record. *See e.g.*, Dr. Mathew, a psychiatrist, recognizing Claimant's depression and relating it to post-concussion syndrome, (EX 28, p.2), Dr. Ware, a psychiatrist and a psychologist, recognizing that Claimant had suffered from depression for over six months and relating the depression to his workplace accident (EX 64, p.30-31), Dr. Gripon, a psychiatrist, diagnosing Claimant with dysthymia. (CX 23, p.1).

to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989).

The presumptions of Section 20 apply in a determination of the necessity and the reasonableness of medical treatment. 33 U.S.C. § 920 (2001)(stating that "it shall be presumed in the absence of substantial evidence to the contrary - (a) That the claim comes within the provisions of this chapter. . . ."); *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809, 120 S. Ct. 40, 145 L. Ed. 2d 36 (1999)(finding a difference of opinion among physicians concerning treatment and deciding the issue based on the whole record); *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Under the Administrative Procedures Act, however, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. *Greenwich Collieries*, 512 U.S. at 281. The Section 20 presumptions were left untouched by *Greenwich Collieries*. *Id* at 280. Accordingly, once a claimant has established a *prima facie* case that medical treatment is reasonable and necessary, the employer must produce contrary evidence, and if that evidence is sufficiently substantial, the presumption dissolves and claimant is left with the ultimate burden of persuasion. *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999). Thus, the burden that shifts to the employer is the burden of production only. *Id*. at 817.

E(1) Establishing a Prima Facie Case of Reasonableness and Necessity

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.* , 21 BRBS 294, 296 (1988). Here, psychiatrists Mathew, Ware, and Gripon all diagnosed Claimant with depression. (EX 28, p.2; EX 64, p.30-31; CX 23, p.1). Both Drs. Ware and Mathew related Claimant's depression to his workplace accident. (EX 28, p. 2; EX 64, p.30-31) Dr. Gripon recommended six to nine months of psychiatric treatment on October 16, 2001. (CX 23, p.2). Accordingly, Claimant has established a *prima facie* case under the Act showing that the proposed treatment is necessary and reasonable.

E(2) Rebuttal of the Presumption

Once a claimant establishes a *prima facie* case, the employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). The Fifth Circuit uses a substantial evidence test in determining if an employer presented sufficient evidence to overcome a Section 20 presumption. *See Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999)(stating that "[o]nce the presumption in Section [20] is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related.")(citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.* , 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Here, Employer did not produce any substantial evidence showing that Claimant did not suffer from depression or that treatment

for depression was unreasonable or unnecessary.[10] Accordingly, continued psychiatric treatment is both reasonable and necessary under the Act and Employer wrongfully terminated Claimant's medical benefits in regards to his psychiatric treatment.

F. Nature and Extent of Injury and Maximum Medical Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

F(1) Nature of Claimant's Injuries and Dates of Maximum Medical Improvement

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

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[10] Dr. Ware stated that a person will "cycle out" of a depression within one year, (Tr. 232). This non-specific generalization that treatment for depression is not always necessary is insufficient to rebut the reasonableness and necessity of psychiatric treatment. The record does contain conflicting reports concerning the proposed length and intensity of treatment ranging from two to nine months, (CX 23, p.1-2; EX 64, p.31-32). Dr. Gripon recommended treatment lasting six to nine months in his last report, (CX 23, p.2), and Dr. Ware recommended two to three months of treatment with Claimant regaining his equilibrium within three to four months and at a maximum of six months. (EX 64, p.32). As Dr. Gripon's recommendations were based in part on an erroneous assumption that Claimant also suffers from a cognitive disorder and Dr. Ware's recommendations are confusing considering different times for treatment and for "regain[ing] emotional equilibrium," I find that at least six months of treatment is warranted under the circumstances.

F(1)(a) Claimant's Complaints of Physical Injury

Claimant asserts that as a result of his workplace injury he suffered an injury to his brain which resulted in various physical symptoms. Specifically, Claimant testified that since his accident he had a hard time balancing, climbing, coordinating motor skills, and he suffered "extreme" migraine headaches that made him sick. (Tr. 43-44). Other symptoms included: sensitive vision, (Tr. 48), loss of ability to do math, (Tr. 54), loss of comprehension, (Tr. 54), loss of ability to assemble complex objects, (Tr. 58-59), loss of rhythm, (Tr. 59), loss of foreign language skills, (Tr. 60), decreased ability to drive more than forty minutes, (Tr. 55), and disorientation, (Tr. 55). The first mention in the record of any cognitive disorder was made by Dr. Patterson on March 1, 1999. (EX 24, p.2-3).

F(1)(a)(i) Neuropsychological Assessments

On May 19, 1999, Dr. Robertson, a clinical psychologist, performed the first of four psychological assessments of Claimant. (EX 32, p.1). In a mental status exam Claimant was able to focus his attention, speak logically and coherently, effectively read and write, have immediate recall memory, have delayed auditory memory of seventy-five percent after thirty minutes, and have eighty-percent visual memory. *Id*. Dr. Robertson detected: a severe deficit in the ability to sustain attention; a moderate impairment in abstract reasoning, problem solving, and tactile performance test; a mild impairment in delayed visual memory, as well as reduced visual fields, reading ability of a tenth grader, spelling ability of a fifth grader, mathematical ability of a seventh grader, and an IQ of 101. *Id*. at 3-6. A personality examination revealed that Claimant viewed himself as damaged, and that Claimant had major thought disturbances to the point of disorientation, and an overall profile consistent with post-concussion disorganization. *Id*. at 7.

In total, Dr. Robertson estimated that Claimant suffered from a moderate degree of impairment affecting ninety percent of his neuropsychological functions, and damage to his frontal, right posterior frontal, anterior parietal, and left occipital regions. *Id*. Dr. Robertson recommended an aggressive treatment for Claimant's chronic pain, anxiety and depression. *Id*. at 8. Claimant's problems of attention, energy, anxiety and depression were all treatable components, but, Dr. Robertson opined that Claimant was not able to return to his prior occupation or any high risk occupation. *Id*. Dr. Robertson also recommended neurological treatment, pain management, anti-anxiety and depression medication, psychotherapy, and cognitive therapy. *Id*.

Dr. Goebel conducted the same examination on June 17-18, 1999. (EX 33, p.1). Dr. Goebel noted that Claimant's results demonstrated considerable variation from Dr. Robertson's report. *Id*. at 2. While noting that Claimant did not show evidence of malingering, several tests designed to reveal that effect generated borderline results. *Id*. at 2-3. These tests, along with the variability in results from Dr. Robertson's administration, suggested that Claimant had a considerable psychological overlay to his problems. *Id*. at 3. Also, Dr. Goebel opined that test results revealed some exaggeration of symptoms as part of a "cry for help." *Id*. Dr. Goebel stated that the longer Claimant was removed from the work-force the more his self confidence would decline. *Id*. Dr. Goebel recommended an immediate program of

cognitive rehabilitation, lasting three to six months, followed by a repeat neuropsychological examination. *Id*.

Dr. Goebel conducted a repeat examination on December 6, 1999. (EX 37, p.1). Dr. Goebel noted: a significant improvement in Claimant's performance IQ; improvement in the Impairment Index and General Neuropsychological Deficit Scale suggesting a mild organic brain impairment; improved performance on the Category test suggesting better concentration, cognitive organization and logical reasoning; and Claimant's Impairment Index had moved to within normal limits. *Id*. at 2. Claimant also demonstrated marked improvement in the General Memory Index and Working Memory Index up to the high average to average range. *Id*. Claimant's academic achievement scores and personality assessment remained unchanged. *Id*. Claimant had poor marks for his Neuropsychological Deficit Scale score, Category score, and his total time on the Tactile Performance Test decreased. *Id*.

While the differences between his two tests were not significant, Dr. Goebel stated that he expected a higher score than due to the temporal proximity between the two tests. *Id*. Claimant's results were suspect for malingering, and the inordinate amount of time Claimant took on some tests, with the variability between neuropsychological tests suggested "considerable psychological overlay" leading Dr. Goebel to opine that Claimant's poor emotional condition contributed to Claimant's overall poor neuropsychological functioning. *Id*. at 2-3. Claimant also reported that many of his symptoms had cleared, but he continued to suffer from severe two-to-four hour debilitating headaches which occurred about once every other day. *Id*. Dr. Goebel recommended that Claimant attend pain management, and agreed with Dr. Patterson that Claimant's headaches were the largest obstacle to returning Claimant to work. *Id*. Dr. Goebel recommended another three months of neurofeedback, and cited a need for neuropsychological rehabilitation. *Id*. In total, Dr. Goebel viewed his second neurological assessment as indicating that Claimant is "mildly abnormal,"[11] and he continued to believe that emotional factors were a significant contributor to his neuropsychological functioning. *Id*. at 3.

On January 10, 2001, Dr. Perez conducted a fourth neuropsychological assessment of Claimant. (EX 47, p.1). No change was noted in Claimant's IQ, but Claimant's General Memory Index score decreased by ten points. *Id*. at 5. As a whole Claimant's memory functioning was consistent with his IQ and reflected no memory impairment. *Id*. Language functioning and sensorimotor functioning both tested as normal. *Id*. at 6. Claimant was able to read at a high school level and do math at a seventh grade level.

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[11] In regards to the improvements Claimant exhibited between Dr. Goebel's first neuropsychological evaluation in June 1999, and his second evaluation in December 1999, Dr. Ware stated that the improvement showed that Claimant's brain was healing and data indicating mildly abnormal responses indicated that some of his impairment was due to emotional factors that was impairing his functioning. (EX 64, p. 49). Dr. Ware downplayed the significance of any repeat improvement in neuropsychological testing because the test takes six to eight hours to administer, are very elaborate, and the tests are performance oriented so an individual could only improve a little with practice. *Id*. at 49.

Id. Claimant's personality profile indicated evidence for symptom magnification and somatization.[12] *Id*. Acknowledging that Claimant suffered from a concussion, Dr. Perez stated that those problems usually all resolve within six months, and comparing Claimant's test results with a pre-accident comparison standard, Dr. Perez found no neuropsychological impairment that would prevent Claimant from resuming his former employment. (Tr. 143)

F(1)(a)(i)(A) Interpreting the Neuropsychological Assessments

The results of Claimant's neuropsychological assessments, combined with the one objective indication in the record of Claimant's pre-accident abilities, do not support a finding that Claimant suffers a lingering brain injury. Dr. Perez testified at hearing that he was surprised at Dr. Robertson's assessment of impairment when the physical data he collected did not support such a conclusion. (Tr. 134). Dr. Perez opined that the reason Dr. Robertson reached his conclusion was because Dr. Robertson had an incorrect comparison standard in which to interpret his results. *Id*. Indeed, Dr. Robertson's diagnosis was based in part on a social history that Claimant was an average high school student, did not enroll in special classes, and had dropped out of a college engineering program to get married. (EX 32, p.3). In fact, Claimant had repeated the tenth grade and while Claimant did not attend special classes, his high school curriculum could neither be characterized as challenging, nor his performance as average. (EX 65). Likewise, Dr. Goebel was operating under the assumption that Claimant graduated high school with a "C" average. (EX 33, p.1).

Also, all neuropsychological evaluators noted that Claimant had a considerable psychological overlay which resulted in test scores slightly lower than his actual ability. (EX 32, p.6;EX 33, p.3; EX 37, p.3; EX 47, p.6). Indeed, Dr. Patterson stated that "one of the problems with neuropsychological assessments is that if an individual is significantly depressed, they (sic) are going to behave in neuropsychological testing in a manner that is somewhat consistent with traumatic brain injury." (CX 1, p. 35). This factor would also account for various discrepancies between individual tests and between assessments. (Tr. 136; EX 33, p.3). For example, Dr. Perez testified that on two memory concentration tests Claimant performed "exceptionally well" on one and performed so poorly on the other that he could be classified as "demented." (Tr. 164). Combing the results from all four tests, Dr. Perez indicated that Claimant's scores between neuropsychological assessments were "consistent" and "stable" from Dr. Robertson's first test on May 19, 1999, to Dr. Perez's last test on January 10, 2001.[13] (Tr. 167).

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[12] No evidence in the record suggests that Claimant was actually malingering. In fact, Dr. Goebel characterized Claimant's initiative and willingness to rehabilitate himself as "amazing." (EX 37, p.3).

[13] On January 18, 2000 Claimant began a three month neuropsychological rehabilitation program. after which, Dr. Patterson noted an odd mixture of lost skills, preserved skills, and partially dysfunctional skills. *Id*. at 8-9. Claimant's short term memory was "deficient and his 'working memory' [was] inadequate for the tasks he [was] accustomed to processing." *Id*. By September 27,

Therefore, as Dr. Perez was the only neuropsychological evaluator to have an objective comparison standard in which to interpret the assessment results, I find that his report is the most well-reasoned, and based on his interpretation, the "consistency" and "stability" of Claimant's scores, and the existence of a psychological overlay, I find that, with the exception of sensorimotor skills, Claimant did not exhibit any neuropsychological "disability," or inability to earn former wages, at the time of Dr. Robertson's first assessment on May 19, 1999. Thus, crediting Dr. Patterson's diagnosis of cognitive disorder on March 1, 1999, four and on-half months after the accident, I find that Claimant had reached maximum medical improvement with regards to a cognitive disorder by May 19, 1999.

Dr. Robertson did note sensorimotor impairments which cannot be explained away on the basis of his failure to attain a valid comparison standard, especially considering that Claimant's two "A" grades in high school were earned in physical education. (EX 32, p.4-5; EX 65). On Dr. Goebel's June17, 1999 exam, however, Claimant largely tested normal and the results of the sensorimotor exam were not significant enough for Dr. Goebel to comment on them. (EX 37, 1-4). On January 10, 2001, Dr. Perez listed Claimant's sensorimotor skills as normal. (EX 47, p. 6). Outside of the neuropsychological assessment of sensorimotor skills by Dr. Robertson, the last real evidence concerning a motor skill impairment is a July 20, 1999, follow-up neurological exam conducted by Dr. Foster, who merely noted that earlier resisting tremors and coordination problems had improved considerably.[14] (EX 34, p.1). Accordingly, I find Claimant had reached maximum medical improvement in regards to any sensorimotor impairments, and all neuropsychological impairments by June 17, 1999, the date of Dr. Goebel's neuropsychological evaluation because that is the first credible evidence, following Dr. Robertson's findings of impairments, that Claimant did not suffer from a sensorimotor deficit and that finding is corroborated by

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2000, Dr. Patterson, now treating Claimant as a psychotherapist, stated in a letter to Carrier that Claimant had not reached maximum medical improvement in relation to his Cognitive, Depressive and Pain disorders. *Id*. at 17. Dr. Patterson, however, never performed a neuropsychological assessment and never bothered to obtain objective data concerning Claimant's pre-injury neuropsychological abilities. (CX 1, p. 65-69). Dr. Patterson did state that one's high school records were not an accurate reflection of ones abilities. *Id*. at 72. Nevertheless, I find that this objective evidence is more credible than Claimant's subjective statements about his pre-injury abilities which Claimant had a propensity to exaggerate. *See e.g.*, (CX 1, p. 71; EX 41, p.82) No party introduced evidence to show that Claimant would not have been able to perform his job as a supervisor based on his high school record.

[14] Dr. Patterson reported on July 27, 2000 that Claimant was unable to touch his nose with his index fingers when his eyes were closed and had difficulty juggling golf balls. (EX 24, p.14). Also, on June 8, 2001, Dr. Gripon, a forensic psychiatrist and neurologist, reported Claimant's complaints that he was sluggish, dizzy, and clumsy. (EX 53, p. 2-3). As Dr. Gripon's report of clumsiness is only substantiated by Claimant's subjective complaints, and Dr. Patterson's findings are contrary to more in depth neuropsychological assessments and Dr. Foster's remarks of considerable improvement made a full year earlier, I discredit Dr. Patterson's conclusion that Claimant continued to suffer from a motor skill impairment as of July 27, 2000.

Claimant's neurosurgeon a month later.

F(1)(a)(ii) Other Objective Findings of Physical Impairment

Having determined that Claimant did not suffer from a neuropsychological disability on May 19, 1999, and that any motor difficulties had resolved by June 17, 1999, the only unrelated physical symptom from Claimant's workplace accident remaining is Claimant's report of headaches.[15] There is no objective evidence in the record to substantiate Claimant's reports concerning his headaches. None of Claimant's physical tests, a CAT scan, MRI, electromyogram, EEG, and brain map, indicated physical or objective evidence of damage to the nervous system or to the brain from the concussion that he sustained. (EX 64, p. 19-20). Dr. Patterson stated, however, that an MRI of the brain is not an accurate indicator of a brain injury because the image is insufficient to differentiate between damaged cells and undamaged cells. *Id*. at 124. A quantitative MRI is possible to find dramatic differences in persons who had suffered brain injuries, but the technology and knowledge had yet to filter into practice on a meaningful way. *Id*. at 124-25. Even without an objective test, however, I credit Claimant's reports of headaches as the record sufficiently establishes the existence and the severity of Claimant's headaches. The following evidence concerning Claimant's headaches was developed in the record:

On November 11, 1998, Dr. Foster, a neurosurgeon, examined Claimant and noted that Claimant had photophobia associated with his headaches and diagnosed a severe concussion to the brain with neck and arm discomfort secondary to a radiculopathy. (EX 13, p.1-2). In his last report from December 1999, Dr. Foster noted that, while other problems had resolved, Claimant still had considerable problems associated with headaches, nausea, and memory loss. (EX 38, p.2).

Claimant began treatment with Dr. Patterson, a clinical psychologist, on March 1, 1999, for post-concussion syndrome. (EX 24, p.1, 7-12). In his September 19, 2001 and September 26, 2001 depositions, Dr. Patterson stated that whenever a person is rendered unconscious by a blow to the head that individual experiences at least "seven G's" (seven times the force of gravity) which is associated with an undetermined amount of kinetic energy. (CX1, p.11). The kinetic energy passes through the brain in a pressure wave disrupting the lipid molecules that make up the nerve membranes in the brain - causing them to lose integrity - resulting in apoptosis, or the destruction of brain cells. *Id*. at 14-16. Also, when enough force is administered to the brain "axonal shearing" occurs which tears apart nerve cell connections. *Id*. at 20-21. By October 21, 1999, Dr. Patterson noted that Claimant's headaches associated with his concussion were creating significant interference with his neurofeedback treatments and diagnosed pain disorder. (EX 24, p. 7). Claimant's chronic pain interfered again with his therapy in June 2000, when Claimant ran out of pain medication. *Id*. at 14.

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[15] Claimant also complained of impaired vision, and Dr. Patterson noted visual orientation difficulties. (EX 24, p.1, 19). Whether Claimant suffers from a visual impairment and whether that impairment, if any, is related to his workplace accident is not developed in the record.

Dr. Mathew, a neurologist and psychiatrist, examined Claimant on March 25, 1999, concluding that Claimant had a history of cerebral concussion which would explain his headaches. (EX 28, p. 2). Given time and supportive care, Dr. Mathew opined that Claimant's headaches should resolve, and hoped that Claimant could return to work within a few weeks. *Id*. On January 13, 2000, Dr. Mathew conducted second neurological evaluation, finding Claimant essentially normal. (EX 39, p.1-2). Dr. Mathew determined that there was a possibility that Claimant's headaches may not be due to post-concussion syndrome finding that Claimant's description of his headaches was somewhat "unusual and dramatic," and raised the possibility that his headaches were due to vascular problems. *Id*. at 2. Dr. Mathew recommended that Claimant take prescription drugs for his headaches, anti-depressants, anti-anxiety medication, and undergo pain management. *Id*. Furthermore, Dr. Mathew opined that Claimant should not return to regular work in a shipyard, and stated the Claimant had not reached maximum medical improvement. *Id*.

When Dr. Goebel examined Claimant for a neuropsychological assessment on December 9, 1999, Dr. Goebel reported that Claimant continued to suffer from severe two-to-four hour debilitating headaches which occurred about once every other day. (EX 37, p. 3). Dr. Goebel recommended that Claimant attend pain management, and agreed with Dr. Patterson that Claimant's headaches were the largest obstacle to returning Claimant to work. *Id*.

On February 1, 2000 Claimant began pain management with Dr. Lopez for his headaches. (EX 41, p.66). Claimant described his pain as burning, sharp and shooting, rating the severity of his pain between three and ten. *Id*. at 72. Claimant also related that the color red caused him to have a headaches and that total darkness without any sound made his pain subside. *Id*. at 74. Dr. Lopez opined that Claimant suffered from migraines and the agitation on seeing the color red may be a result of seizure type activity. *Id*. at 90. On March 1, 2000, Claimant indicated that a prescription of Topomax and Tegretol reduced the frequency and intensity of his headaches. *Id*. at 96. On Claimant's next appointment, April 5, 2000, he indicated that his headaches were "very well reduced" and the prescription medication continued to decrease their frequency and intensity. *Id*. at 103. On July 18, 2000, Claimant indicated that he ran out of prescription medication in June and his debilitating headaches returned in full force, however, he reported their duration as approximately once per week. *Id*. at 107.

On September 19, 2000, Dr. Lopez noted that Claimant's condition was stable, but noted that Claimant had continuing problems with headaches, neck pain and mobility. *Id*. at 111. By March 13, 2001, Claimant indicated to Dr. Lopez that he continued to suffer headaches, but he felt more in control as his headaches were not nearly as frequent or intense. *Id*. at 119. There was no change in Claimant's condition at his next appointment on July 17, 2001. *Id*. at 122.

Dr. Ware, a psychiatrist and neurologist, also diagnosed Claimant with, *inter alia*, post concussion disorder, cerebral concussion with post-concussion syndrome, and post-traumatic headaches. (EX 43, p.2-3). Dr. Ware testified that after six months the brain has usually completely healed itself and to explain Claimant's symptoms a physician had to look elsewhere for the source. (Tr. 201). Dr. Ware also implied that any complaints of headaches resulting from a closed-head injury should improve over time because

the injury to the brain is at the time of impact, and the injury will not progress unless there is some tearing or bleeding, symptoms which Claimant did not exhibit in a CT scan of his brain at St. Patrick Hospital. (Tr. 193-94). Claimant should have been able to return to work in three months, and certainly within six months of his workplace accident. (Tr. 201-02).

On April 27, 2001, Dr. Ware opined that Claimant's main improvement was due to Tegretol, his prescription of headache medication. (EX 44, p. 3). Interestingly, Tegretol also serves as an anti-convulsant, mood stabilizer, and impulse control catalyst. (EX 64, p.13). Dr. Ware noted that Claimant's headaches, his lone remaining symptom, had decreased in severity and frequency and Dr. Ware did not view them as incapacitating. *Id*. at 30.

Similarly, When Dr. Perez examined Claimant for a neurological assessment on January 10, 2001, Dr. Perez noted Claimant's reports of headaches and noted that Claimant had "pretty much learned to live with [the symptoms] after two years.". (EX 47, p.1-2). Dr. Perez also noted a great deal of symptom magnification, a marginal adjustment to life, and a profile of one who generally complains of more symptoms than objectively exist. *Id*. Dr. Perez concluded that Claimant had some secondary gain issues, but from a neurological standpoint, Claimant was neither impaired nor disabled, and was fully capable of returning to employment. *Id*. at 7.

Dr. Perez did admit that Claimant likely suffered a concussion, however, he found no evidence of any neuropsychological injury beyond a mere concussion. (Tr. 142). A concussion does not cause irreversible brain injury and Claimant should have reached maximum medical improvement three to six months after the accident, and most probably did so within six weeks. (Tr. 128-29, 143). Thus, Claimant could resume his former employment. *Id*.

F(1)(a)(ii)(A) Interpreting Other Objective Findings of Physical Impairments

Accordingly, all of Claimant's physical symptoms, except his headaches, had cleared before Claimant began treatment with Dr. Lopez on February 1, 2000. Prior to that date Claimant had consistently complained of chronic and debilitating headaches. *See e.g.*, (EX 24, p.19).

Based off the reports of Dr. Lopez on March 1, 2000, Claimant indicated that his new prescription medication reduced the frequency and intensity of his headaches, and Claimant stated that he was "doing fairly well by his own account." (EX 41, p. 96). Return visits to Dr. Lopez on April 5, 2000; September 19, 2000; and July 17, 2001, revealed no significant changes in regards to Claimant's headaches. Also, neither Dr. Ware, nor Dr. Perez viewed Claimant's headaches as debilitating, and after Claimant received proper treatment, the only problem that Dr. Patterson noted was when Claimant's prescription ran out. (EX 24, p.14; EX 47, p.1-2, 7; EX 64, p.30). Therefore, in regards to Claimant's headaches and all other reports of physical impairments, I find that Claimant had reached maximum medical improvement by March 1, 2000, without suffering any residual "disability," or an inability to earn his prior wages.

F(1)(b) Claimant's Complaints of Psychological Injuries

Claimant asserts that as a result of his workplace injury and inability to return to work he suffers from debilitating psychological injuries consisting principally of depression. Specifically, Claimant testified that he is depressed because he had worked for about thirteen years and was pretty sure that he could never return to his former employment, and his injury effectively prevented him from preforming any task (Tr. 44-45). Claimant does not have any hobbies and the fact that he sits at home, bored, furthers his depression. (Tr. 99). In total, Claimant stated his life was "pretty miserable" because he could not go long without a debilitating headache or medication, he wanted to be "normal" again, and have his old job and life back. (Tr. 60).

F(1)(b)(i) Objective Findings of Psychological Impairments

In May 1999, Dr. Robertson diagnosed Claimant with major depression based on Claimant's enunciation of suicidal thoughts and a personality profile suggesting isolation, limited ego strength, boredom, delusional thinking, apathy, and an overall view of himself as damaged. (EX 32, p.2, 7-8). On June17, 1999, Dr. Goebel, while not diagnosing depression, noted that Claimant had a personality profile centering on dissatisfaction, low ego strength, poor self concept and an overly critical attitude. (EX 33, p.3). Dr. Weil diagnosed depression on November 20, 2000. (EX 42, p.4). On January 9, 2001, Dr. Patterson reported that Claimant attempted suicide but the effort failed when Claimant's weapon misfired. (EX 24, p.23).

When Dr. Perez interviewed Claimant, he stated that "I have lost everything in my life that I love . . . . my mental capabilities, my job skills, my career, the girl I love." (EX 47, p. 4). The three psychiatrists in the record, Drs. Mathew, Ware, and Gripon all diagnosed Claimant with depression, and Drs. Ware and Gripon diagnosed mild dysthymia. (EX 28, p.2; EX 53, p.2; EX 64, p.30-31). Dr. Gripon last treated Claimant on September 24, 2001, and by letter on October 16, 2001, had repeated his diagnosis of dysthymia. (CX 8, p.1; CX 23, p.1).

F(1)(b)(i)(A) Interpreting the Objective Findings of Psychological Impairments

All psychiatrists in the record, and most of Claimant's examiners, have remarked that Claimant suffers from depression. Claimant's first psychiatric treatment for depression began with his visit to Dr. Gripon on September 24, 2001. Claimant only had one session with Dr. Gripon, however, because Carrier terminated all medical benefits on the day following the hearing. (CX 23, p.1; Cl. Br. at 1-2). Accordingly, Claimant suffered a workplace injury for which he requires further treatment, however, as discussed *infra*, this does not preclude a finding that Claimant has reached maximum medical improvement because I find that Claimant's depression does not interfere with his ability to return to work.

F(2) Extent of Claimant's Injuries

Case law has established that in order to establish a *prima facie* case of total disability under the

Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294 (5th Cir. 2000); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996); *P&M Crane Co. V. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

To receive compensation under the Act, a claimant must have both a medical impairment and an economic impairment. By itself, a failure of the employer to make an employee's former job available only establishes the economic element in the disability equation and is not sufficient, without the corresponding medical component, to demonstrate entitlement to total disability. *Director, OWCP v. Berkstressor,* 921 F.2d 306 (D.C. Cir. 1990); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991); *Cheramie v. Fourchon Welding Contractors, Inc.*, BRB No. 99-0532 (April 20, 2001)(unpub.). In establishing the nature or extent of a Claimant's injuries the Section 20 presumptions do not apply. *Carlisile v. Bunge Corp.*, 33 BRBS 133 (1999); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988); *Carver v. Potomac Electric Power Co.*, 14 BRBS 824 (1981), *aff'd mem*., 673 F.2d 551 (D.C. Cir. 1982). *Cf. Turner*, 661 F.2d at 1038 (stating that Section 20 presumptions have been "extended to include the nature and extent of injury.")(citing *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C.Cir. 1980), *cert. granted sub. nom., U.S. Industries/Federated Sheet Metal, Inc., v. Director, OWCP*, – U.S. –, 101 S. Ct. 1512, 67 L.Ed. 2d 813 (1981); *Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827, 833 (9th Cir. 1981); *Strachan Shipping Co. v. Shea*, 406 F.2d 521, 522 (5th Cir. 1969). Thus, the claimant has the burden of proving the nature and extent of his injury. *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 173 (2nd Cir. 2001)(finding that a claimant was not entitled to compensation after the ALJ determined that he could resume his former employment on the date of maximum medical improvement); *Trask v. Locheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980);

F(2)(a) Inability to Return to Former Employment

Having concluded that Claimant has no lingering organic brain impairment based on his psychological assessments, and having determined that Claimant's headaches reached maximum medical improvement as of March 1, 2000, neither of which affect Claimant's ability to return to work, the sole remaining issue concerning Claimant's ability to resume his former employment is his lingering depression.

F(2)(a)(i) Evidence the Claimant's Depression Prevents Him From Returning to Work

Dr. Patterson refused to authorize Claimant for even light duty work stating that such employment would further damage Claimant's psychological status because it would remind Claimant of his former abilities. (EX 25, p.5; CX 1, p. 42). Dr. Patterson also labeled Claimant as impaired under the social security criteria for organic brain disorders. (CX 1, p.43). Future employment would be dependent on

re-training and very specific placement.[16] *Id*.

On January 13, 2000, Dr. Mathew, a psychiatrist, opined that Claimant could not return to his former employment for a variety of reasons, one of which was Claimant's need to reduce his mental strain. (EX 39, p.2). Likewise, Dr. Robertson on June 4, 1999, stated that because of Claimant's depression, and his diagnosis of other cognitive impairments, no determination could be made concerning Claimant's ability to return to work for another year. (Ex 32, p.8).

Dr. Gripon, a psychiatrist, also diagnosed Claimant with dysthymia on July 2, 2001. (Ex 53, p.2). In conjunction with a diagnosis of a cognitive disorder, Dr. Gripon stated in an October 16, 2001 letter that Claimant could not return to his former employment at that date, but was in need of some supportive psychotherapeutic work. (CX 23, p.1).

F(2)(a)(ii) Evidence that Claimant's Depression Does Not Affect His Ability to Work

Dr. Ware, a psychiatrist, diagnosed Claimant with depression, but stated the his psychiatric condition was not a major impairment and Claimant could resume his former work. (EX 44, p.3; EX 64, p.31). Many of Dr. Ware's patients who suffer from dysthymia continue working while receiving treatment.

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[16] At his deposition, Dr. Patterson had the opportunity to address the ability of Claimant to return to his former employment and various jobs that Mr. Quintanilla had identified. Specifically, Dr. Patterson stated:

> . . . [H]e is going to need a lot of support to re-join the work force because of the deficits he has. As I was saying, the expectation in any trade is that somebody can tell you to go do something and then you'll go carry it out in a timely manner. I don't think Mr. Fredieu can function independently with those kinds of tasks unless it's something incredibly simple, and that would probably only cause him to deteriorate further. He'd get more depressed.
>
> I mean, if you set Mr. Fredieu to digging a ditch, that would kill him psychologically because he has been accustomed to being in a very sophiscated position. I actually interviewed him at one point as to how he kept track of on (sic) his job sites when he was doing supervision, and he had an incredibly sophisticated system that was literally like - - he had a mental program that was holographic in quality that would allow him to keep track of the entire job site, where his people were, and what the progress was. It was all color coded. He can't do that any more. . . . Now, the problem is he knows he used to be able to do it and he knows he can't do it anymore, and he is really depressed about the loss.

(CX 1, p.43-45)

Id. at 56-57. Indeed, not working and being idle is the absolute worse thing a person suffering from depression can do. (Tr. 210). Specifically, Dr. Ware suggested that Claimant enter a supportive and directive treatment program with counseling once a week for two to three months and have his medication managed. (EX 64, p.31-32). The fact that Claimant had suffered from depression for over two and one-half years did not alter Dr. Ware's opinion on the length of treatment. *Id*. at 55. Normally, without treatment a person will overcome depression within one year. (Tr. 232).

On April 27, 2001, after reviewing Claimant's medical records, Dr. Ware recommended that Claimant take anti-depressant medication, undergo psychiatric treatment for two to three months, and he opined that Claimant appeared impaired as a result of his injuries. (Tr. 215). Dr. Ware, however, did not feel as though Claimant could not return to work, only that Claimant needed further treatment. (Tr. 216). Likewise, Dr. Perez, a psychologist, attributed Claimant's depression to boredom from not working. (Tr. 140).

F(2)(a)(iii) Interpreting the Evidence

In regards to Dr. Gripon's conclusions, Dr. Ware stated that he agreed diagnostically in Dr. Gripon's conclusion of depression. *Id*. at 34. Dr. Ware disagreed with Dr. Gripon's diagnosis of cognitive disorder, however, because he did not did see any evidence, such as impairment of memory, to support that diagnosis. *Id*. As discussed, *supra*, I find no evidence of a residual cognitive disorder after May 19, 1999. Accordingly, as Dr. Gripon's recommendation for psychotherapeutic work is based both on the fact that Claimant suffered a cognitive disorder and depression I find that it is not well reasoned and entitle his opinion to less weight. Similarly, both Dr. Mathew's and Dr. Robertson's reports were intertwined with the fact that Claimant suffered a lingering organic brain impairment and as such their opinions are entitled to less weight.

In regards to Dr. Patterson's conclusions, I find that his conclusions are also based on the erroneous assumption that Claimant suffers from a cognitive disorder. Furthermore, Dr. Patterson's entire theory of disability was based on a vicious circle where a person is depressed because of an inability of their brain to function properly and that depression further deteriorates the structure causing deeper depression. (CX 1, p.35-38). Accordingly, as Dr. Patterson erroneously diagnosed a cognitive disorder after May 19, 1999, which was based in part on an improper comparative standard, (CX 1, p.59; EX 65), and because Dr. Patterson wedded a brain disorder and depression together in the creation of a vicious circle, I find that his opinion that Claimant cannot return to work is entitled to less weight.

Dr. Ware stated that headaches could cause both depression and anxiety, and depending on the degree of severity, could impair an individuals ability to function. (EX64, p.41). One cure for depression, however, is activity. *Id*. Dr. Ware did not see a measure of anxiety in Claimant's condition, but he did

state that anxiety and depression interfere with functioning.[17] *Id*. at 42-43. Dr. Ware negated Claimant's failed welding attempt as an insignificant effort to return to work and related that Claimant's efforts to go fishing and other aspects of Claimant's lifestyle were not indicative of someone laying around and waiting for a check. *Id*. at 37. Accordingly, as Dr. Ware's analysis of Claimant's ability to return to his former employment is based solely on Claimant's continued depression, I entitle his opinion to greater weight.[18] Therefore, based on the record as a whole, I find that Claimant's lingering depression does not affect his ability to return to his former employment, thus, despite having a treatable work related depression after March 1, 2000, that depression did not affect Claimant's ability resume his former employment and does not dictate a later date for the onset of MMI.

F(3) Claimant' Right to Continuing Total Disability Following Maximum Medical Improvement and Determination that Claimant Was Able to Perform His Former Job

Ordinarily, once a claimant demonstrated that he cannot return to his former employment, the claimant is entitled to continuing total disability payments after reaching MMI until the employer can show suitable alternative employment at the critical times. *Steven v. Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990)(holding that total disability does not become partial, retroactive to the date of maximum medical improvement upon a later showing of suitable alternative employment because that would ignore the economic aspect of a claimant's disability and assume that there was no change in the job market); *Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990)(same); *Palombo v. Director OWCP*, 937 F.2d 70 (2nd Cir. 1991)(requiring different analysis for both nature and extent); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(holding an employee's total disability becomes partial on the date the employer shows suitable alternative employment).

In cases where the claimant reaches MMI without any residual impairment affecting his ability to resume his former employment, however, such a finding terminates total disability to the date of MMI because there is no residual economic or medical impairment. *Universal Maritime Service Corp., v.*

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[17] Dr. Ware also attributed Claimant's lingering depression to inadequate treatment by Dr. Patterson. (EX 64, p. 43). Dr. Ware indicated that when a physician magnifies symptoms it sends a message to the patient that the difficulty the patient had is serious and the patient takes longer to get well. *Id*. at 35. Dr. Ware also opined that the fact that Claimant's workers' compensation claim is still pending encouraged Claimant to dally rather than return to work. *Id*. at 35-36. Likewise, In the opinion of Dr. Perez, The fact that Dr. Patterson made no effort to return Claimant to work helped reinforce Claimant's disability. (Tr. 141). Dr. Patterson reinforced Claimant's disability because, an authoritative figure legitimized Claimant's complaints and his treatment process reinforced Claimant's belief process in his disability. (Tr. 174).

[18] Dr. Perez, like Dr. Ware, also opined that Claimant could return to work even though he continued to suffer from depression, and in fact, work was one cure in the treatment of such mental illnesses. (Tr. 140).

Spitalieri, 226 F.3d 167, 173 (2nd Cir. 2001)(using a Section 22 modification to establish a credit for employer retroactive to when employer established that the claimant had reached MMI and could return to his former employment); *Johnson v. Director, OWCP*, 141 F.3d 1176, 1998 WL 121672, *1 (9th Cir. 1998)(unpub.)(stating that after the ALJ weighed the medical evidence the claimant failed to prove he could not return to his former employment, thus employer had no obligation to prove otherwise). Accordingly, as Claimant has reached MMI on March 1, 2000, and has failed to show that he cannot return to his former employment, Claimant is not entitled to continuing total disability, and Employer is entitled to a Section 14(j) credit of retroactive to the date of MMI.

G. Section 14(j) Credit

The Act contains specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury, disability or death. See 33 U.S.C. §§§ 903(e), 914(j), 933(f) (2001). Pertinent here is Section 14(j) which provides: "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installments of compensation due." 33 U.S.C. § 14(j) (2001). The purpose of Section 14(j) is to reimburse the employer for the amount of its advance payments out of any unpaid compensation and does not establish a right of repayment or recoupment. *Stevedoring Servs. of America v. Eggert*, 953 F.2d 552, 556-57 (9th Cir. 1992); *Cooper v. Gulf*, 957 F.2d 1199, 1208 (5th Cir. 1992); *Vitola v. Navy Resale & Servs. Support Office*, 26 BRBS 88, 97 (1992). Medical expenses are not "compenation" and Section 14(j) credit may not be used against future medical expenses. *Aurelio v. Louisiana Stevedores*, 22 BRBS 418, 423 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. 1991).

Employer terminated all compensation benefits effective October 12, 2001. From October 21, 1998 to October 12, 2001, Employer paid Claimant $82,271.50 in compensation. (ALJX 1). This sum included varying rates of compensation and two lump sum payments. *Id*. As discussed, *supra*, Claimant average weekly wage at the time of the accident was $916.32, with a corresponding compensation rate of $610.88, and Claimant reached MMI without a residual "disability" on March 1, 2000. Thus, Claimant is entitled to 72.14 weeks of compensation (October 16, 1998 - March 1, 2000) at a rate of $610.88, or, $44,068.88, and Employer is entitled to a Section 14(j) credit of $38,202.62 (less accrued interest on unpaid compensation up to March 1, 2000).

H. Conclusion

Based on the record as a whole I find insufficient grounds to impeach the credibility of Claimant. Claimant's average weekly wage at the time of his injury was $916.32 per week with a corresponding compensation rate of $610.88. Claimant established that his lingering depression was causally related to his workplace accident and established entitlement to continuing psychiatric treatment for depression. Claimant failed to establish that he is entitled to continuing total disability. Specifically, considering Claimant's pre-injury record, Claimant did not establish that he had a lingering neuropsychological

disability, and failed to establish that he had a disability associated with his headaches after March 1, 2000. Likewise, based on the record as a whole, Claimant failed to establish that his lone lingering impairment - depression - prevented him from engaging in his former employment. Accordingly, Claimant reached MMI on March 1, 2000 without a lingering medical or economic disability and Employer is entitled to a Section 14(j) credit for any future unpaid compensation.

I. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

J. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation from October 15, 1998, the date of injury, to March 1, 2000, based on an average weekly wage of $916.32 and a corresponding compensation rate of $610.88.

2. Employer shall be entitled to a credit, pursuant to Section 14(j) of the Act, for all compensation paid to Claimant after March 1, 2000.[19]

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act, including psychiatric care for Claimant's depression.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge

[19] *See* "Section G," finding that Employer is entitled to a credit of $38,202.62 less accrued interest on unpaid compensation from October 16, 1998 to March 1, 2000.